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90-1708

No. 90-———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of the State of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was suspended from the practice of law for three years based on allegedly "false and misleading" statements he made in written communications, the sole purpose of which was to establish a dialogue with Scottish solicitors about the prospects of pursuing certain litigation in the state courts of Texas. The first question presented is whether the Texas courts violated petitioner's First Amendment rights in imposing and affirming that sanction, because of their failure to take into account the sophistication of petitioner's intended audience, their failure to require respondent to prove legitimate state interests served by the application of the State Bar's disciplinary rules to petitioner's communications with other attorneys in Scotland, and their application of vague, broadly-defined rules to punish petitioner's exercise of his right of free expression—all in conflict with applicable decisions of this Court, and of other federal and state courts that have afforded constitutional protection to similar attorney communications.

2. Petitioner's suspension also was premised on his alleged violation of a provision of a court-imposed period of disciplinary probation that required him to refer to other attorneys all new clients for a period of time. The second question presented is whether petitioner's due process rights were violated by the imposition of sanctions for an alleged violation of this provision, when he acted consistently with the advice of a court-appointed custodian, and when the conditions of probation were vague, internally inconsistent, and in facial conflict with other State Bar disciplinary rules and prevailing custom and usage, such that petitioner did not have fair notice of what conduct could lead to sanctions.

LIST OF PARTIES

The parties in the Texas courts were the parties listed in the caption to the Petition. Because of the potential applicability of 28 U.S.C. § 2403(b) to this Petition, a copy has been served upon the Attorney General of Texas. Supreme Court Rule 29.4(c).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Benton Musslewhite respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fourteenth Court of Appeals of the State of Texas, entered in the matter styled *Musslewhite* v. *State Bar of Texas* on February 8, 1990.

OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals of the State of Texas is reported at 786 S.W.2d 437, and is reprinted in Appendix A, at 1a-15a. The decision of the 270th District Court, Harris County, Texas, revoking petitioner's probation and suspending him from the practice of law for three years is not reported. The October 19, 1988 letter order of Senior District Court Judge Solomon Casseb, Jr., granting respondent's motion to revoke petitioner's probation, is reprinted in Appendix B, at 16a-17a. For unexplained reasons, Judge Casseb subsequently issued two separate sets of Findings of Fact and Conclusions of Law. The first set, signed December 27, 1988, is reprinted in Appendix C, at 18a-29a. A second, more elaborate set of Findings of Fact and Conclusions of Law was signed by Judge Casseb on December 29, 1988, and is reprinted in Appendix D, at 30a-49a.

On November 28, 1990, the Supreme Court of Texas denied petitioner's application for writ of error to the Fourteenth Court of Appeals. That Order is reprinted in Appendix E, at 50a-51a. On February 6, 1991, the Supreme Court of Texas denied petitioner's timely motion for rehearing of the application for writ of error. That Order is reprinted in Appendix F, at 52a-53a.

JURISDICTION

The Judgment of the Fourteenth Court of Appeals was entered on February 8, 1990. The Supreme Court of Texas denied petitioner's request for discretionary re-

view of that Judgment in an Order dated November 28, 1990. A timely petition for rehearing of that Order was denied in an Order of the Supreme Court of Texas dated February 6, 1991. This Petition is filed within ninety days of the entry of that Order, and is timely pursuant to Supreme Court Rules 13.1 and 13.4.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The federal constitutional issues presented herein were raised in the District Court and Court of Appeals, and rejected. Those issues were presented to the Supreme Court of Texas but it denied discretionary review.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Disciplinary Rules 2-101 and 2-107, contained within the State Bar rules promulgated by the Supreme Court of Texas, are reprinted verbatim in Appendix G, at 54a-56a.[1]

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[1] The version of the Disciplinary Rules set out in Appendix G is that which was in effect in 1988, when petitioner was suspended from the practice of law. DR 2-101, governing Publicity and Advertising, recently has been recodified at SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS, art. 19, § 9 (Rules of Professional Conduct) Rule 7.01 (1989). *See* App. A, at 4a & n.1. Throughout this Petition, petitioner will refer to the version of DR 2-101 that was in effect at the time of his alleged violations.

STATEMENT OF THE CASE

A. Petitioner's Background.

Petitioner Benton Musslewhite, who will be sixty on his next birthday, has been suspended from the practice of law for three years. He has been a member of the State Bar of Texas since 1954. In that year he graduated with honors from the Southern Methodist University School of Law, and in 1957 he received an LL.M. degree, with honors, from Georgetown University Law School. From 1955 through 1957 petitioner served as a Captain in the United States Army Reserve. He graduated from the Judge Advocate General School at the University of Virginia, and was decorated for his service as an Aide to the Army's Judge Advocate General, stationed at the Pentagon.

Petitioner was appointed by President Kennedy as an Advisor to the National Council on Physical Fitness in 1961 and as a member of the Advisory Board to the Area Redevelopment Administration in 1962. He has twice been an unsuccessful candidate for a seat in the United States Congress, and from 1969 through 1970 served as a Legislative Aide, and then Administrative Assistant, to United States Senator Ralph Yarborough.

Since 1958, and except for his tenure with Senator Yarborough, petitioner has been actively engaged in the practice of law in Texas. Throughout his career at the Bar he has specialized in litigation, primarily on behalf of plaintiffs in complex personal injury cases. He has been involved in many maritime personal injury lawsuits, often representing in American courts foreign workers who were injured in offshore oil exploration and drilling operations sponsored by American petroleum companies. He has served as regional counsel for the National Maritime Union and as American Counsel for the Offshore Petroleum Workers Union of Brazil and Venezuela.

In 1983, petitioner became one of the nine members of the management committee for the plaintiff class in

the Agent Orange litigation. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987). His unsuccessful challenge to the court-sponsored settlement of that litigation on behalf of Vietnam veterans' organizations led to substantial recognition and notoriety. In February, 1986 petitioner was profiled by the *ABA Journal* as a member of "The New Elite Plaintiffs' Bar." *See* Wagner, *The New Elite Plaintiffs' Bar*, 72 ABA Journal 44, 47 (1986).

Petitioner also is a member of the Bar of this Court, who during the October 1987 Term successfully represented the petitioner in *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140 (1988). In that case, petitioner represented a foreign national, killed in Singapore while working on a vessel owned by an American company. After years of litigation in the state and federal courts, petitioner successfully urged this Court to recognize that federal *forum non conveniens* principles do not necessarily apply to state court litigation initiated by foreign residents. It is ironic that petitioner now has been suspended from the practice of law for three years, in part for urging Scottish solicitors who represented the victims of a North Sea offshore oil platform disaster to consider filing suit against the American owners and operators of the platform in the state courts of Texas, relying upon the principles adopted by this Court in *Chick Kam Choo*. *See* App. 75a, 77a, 82a.

B. The 1987 Disciplinary Proceedings.

In 1986 respondent, the State Bar of Texas, instituted a disciplinary proceeding against petitioner centering on allegations that he had neglected the matters of four clients by failing to return their telephone calls. In 1987 respondent instituted a second disciplinary proceeding against petitioner alleging that he had used paid "runners" to solicit clients on his behalf.[2] The two actions were

[2] These grievance proceedings against the petitioner, and several other prominent Houston plaintiffs' personal injury lawyers, were widely publicized and highly controversial. For example, in a May,

consolidated and in November, 1987 were settled by an Agreed Judgment entered in the District Court of Harris County, Texas. The less than pellucid terms of that Agreed Judgment gave rise to the 1988 disciplinary proceedings that are the focus of this Petition. The Agreed Judgment is reprinted in Appendix H, at 57a-62a.

Under the Agreed Judgment petitioner was suspended from the practice of law for a period of ninety days to commence on November 1, 1988, unless for good cause shown petitioner convinced the District Court to delay commencement of the ninety-day suspension to some other date prior to August 1, 1989. In addition, petitioner was suspended from the practice of law for three years commencing on February 1, 1988, with imposition of that period of suspension suspended and petitioner placed on probation. During this three year period of probation petitioner agreed not to commit professional misconduct as defined by the State Bar Rules and he agreed to "accept no new employment by clients until November 1, 1988, although [petitioner] may refer potential clients to other attorneys." App. H, 59a.

The District Court appointed Hartley Hampton, another member of the Bar, as a custodian over petitioner's practice, and required petitioner to cooperate with the custodian in reviewing petitioner's client files and in informing petitioner's clients about the terms of the suspension and probation. *Id.* 59a-61a. The custodian was authorized to apply to the District Court for the revocation of petitioner's legal fees in any case in which the custodian determined that petitioner had obtained em-

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1987 article the *Houston Post* reported charges from the Chairman of the Executive Committee of the State Bar of Texas that the investigation was being handled by a "runaway prosecutor." The outgoing President of the State Bar was quoted as stating that "vigilante groups are financing the investigation." Houston Post, May 23, 1987, at 27E. *See also* The Texas Lawyer, June 1, 1987, at 1.

ployment in violation of the Disciplinary Rules. *Id.* at 61a-62a.[3]

Finally, petitioner agreed that if he were found by the District Court to have violated any term of his probation, "the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three (3) years . . .," *id.* 59a-60a, with petitioner afforded the right to appeal from any such order. *Id.* 60a-61a.

C. The Piper Alpha Disaster.

On July 6, 1988, an off-shore oil platform, known as the Piper Alpha, exploded in the North Sea off the coast of Aberdeen, Scotland. Some 166 men were killed or injured. The platform was owned and operated jointly by American companies or their subsidiaries, including Occidental Petroleum and Union of Texas. Petitioner learned of the disaster several days after it occurred.[4] On Sunday, July 10, 1988, petitioner telephoned a Scottish solicitor, Tony Sandilands, with whom he was working on another matter. That solicitor informed petitioner that he represented two victims of the Piper Alpha explosion, and

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[3] This provision obviously was designed to determine whether, in fact, petitioner had employed "runners" to solicit cases for him, and to require him to forfeit any fees obtained from such cases. The custodian never invoked these procedures. Petitioner consistently has denied that he used "runners" as alleged by the State Bar, and contended throughout the proceedings below that he entered into the Agreed Judgment principally in order to end the expense and distraction caused to his personal life and his law practice by the extensively-publicized State Bar prosecution.

[4] In his initial set of Findings of Fact and Conclusions of Law, Judge Casseb found as Fact "No. 1" that "[b]eginning at approximately 10:30 that morning [July 6], Benton Musslewhite began making telephone calls to Scottish Solicitors to discuss the matter." App. C, at 18a. By contrast, two days later, Judge Casseb correctly found that petitioner did not even learn of the tragedy until July 8 or 9. App. D, at 35a (Finding 34). Many of the District Judge's Findings of Fact are internally inconsistent and unsupported by the record. The Court of Appeals' interpretation of the record was no better. *See* note 15 *infra*.

he expressed disappointment that this Court's decision in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), probably precluded any hope for the Scottish victims to retain jurisdiction in the American courts in lawsuits against the American oil companies who owned and operated Piper Alpha.[5] Petitioner disagreed with Sandilands, based on his recent success in *Chick Kam Choo*, and opined that if the victims could prevent removal to the federal court system, and maintain jurisdiction in the state courts of Texas, Louisiana or California, there was a chance for a more favorable outcome on the *forum non conveniens* issue.

Petitioner offered to advance by a few days a trip to England and Portugal he already had planned for July 17, to come to Scotland, and to discuss with Sandilands and other solicitors the jurisdictional issues posed by the Piper Alpha disaster. Sandilands agreed. At that point, petitioner telephoned several other Scottish solicitors with whom he had worked over the years on cases arising out of injuries to North Sea oil workers, and learned that representatives of an American law firm already had arrived in Aberdeen and were attempting to orchestrate a quick settlement on behalf of all or most of the victims. Tr. of Sept. 20, 1988, at 11-15.

Because of his awareness of the problems posed by the terms of his probation, petitioner next contacted several other personal injury lawyers in the Houston area to see if they would be interested in referrals from the Piper Alpha disaster.[6] Petitioner contacted Kelly Newman, a

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[5] In *Piper*, this Court affirmed the dismissal, on *forum non conveniens* grounds, of actions by Scottish victims of an airplane crash over Scotland, which were pending in the federal courts of this country against the American manufacturers of the plane and its propellers. This Court agreed that consideration of the competing private and public interests at stake favored a trial in Scotland. *See* 454 U.S. at 257-61.

[6] Under the terms of the Agreed Judgment petitioner knew that he would not be able to take on any cases himself arising from the Piper Alpha tragedy until November 1, 1988, and would have

former associate in petitioner's firm, and asked whether he would be able to travel to Scotland immediately, contact solicitors that petitioner had known over the years, and discuss with them the prospect of their clients' filing a lawsuit in the state courts of Texas as opposed to participating in a quick, and possibly inadequate, settlement. Petitioner next spoke to John O'Quinn, a prominent Houston personal injury lawyer who also had been a member of the plaintiffs' management committee in the Agent Orange litigation. Mr. O'Quinn was aware of petitioner's Agreed Judgment, and indicated his willingness to accept referrals from petitioner and to allow petitioner to recommend that the Scottish solicitors talk with O'Quinn about their clients' cases. Tr. of Sept. 20, 1988, at 14-21 (testimony of petitioner); at 58-63 (testimony of Kelly Newman). O'Quinn testified that he had authorized petitioner to

> tell the solicitors that if they wanted to have cases filed in Texas and if they wanted me to be involved that I was interested in working with them on such cases or in taking such cases on a referral. . . .
>
> * * * *
>
> I think in all fairness to everybody, I'd have to say that I would probably end up taking those cases. They looked like terrific cases from what little I could tell. Tr. of Oct. 17, 1988, at 190, 192.

Mr. Newman arrived in Aberdeen on July 13, 1988. Petitioner arrived the following evening. Upon arrival in Scotland, Newman and petitioner were informed that because of the hostility of the Scottish press and legal community to the reported tactics of American lawyers in soliciting victims of the Bhopal disaster, they should con-

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to serve a ninety-day suspension at some point between November 1988 and August 1989. But petitioner also knew from past experience that it was unlikely that any of the Scottish solicitors "would actually be hiring any [American] lawyers probably until late this year [1988] or until after they had spent about six months or a year in trying to settle the cases in Scotland." Tr. of Oct. 17, 1988, at 218. *See also id.* at 243.

sider hiring a public relations consultant to help get out their message that they would not deal with victims directly, but only intended to meet with solicitors representing those victims. Tr. of Sept. 20, 1988, at 26-27. The consultant was hired, and on July 15, 1988, he arranged a small press conference attended by five to ten local news reporters. A copy of the news release, distributed at that conference, is reprinted in Appendix K, at 75a-76a. Also on July 15, 1988, petitioner (with the aid of the public relations consultant) distributed a letter to Scottish and United Kingdom solicitors, discussing the purposes of his trip and the complexities of the jurisdictional issues posed by the Piper Alpha tragedy. Petitioner's letter to solicitors is reprinted in Appendix N, at 81a-84a.[7]

On July 16, 1988, petitioner left Aberdeen to handle other business concerns in London and Portugal. He did not return to Scotland thereafter. Newman remained in Scotland and, on July 18, 1988, over the objections of petitioner, placed an advertisement in the Scottish newspapers and issued a letter to the victims and families of the victims of the Piper Alpha disaster. Respondent charged petitioner with allegedly false and misleading statements in the advertisement and the letter to victims, and the Texas courts relied on those communications in suspending petitioner from the practice of law. But Kelly Newman, who authorized the advertisement and signed the letter, never was charged by respondent with any disciplinary violations.[8] The newspaper advertisement is re-

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[7] Respondent sought to revoke petitioner's probation based on allegedly false and misleading statements contained in the news release, constituting professional misconduct in violation of DR 2-101. App. I at 67a-68a. Although respondent did *not* rely on petitioner's letter to solicitors as a basis for revoking petitioner's probation, the District Judge did (at least in his first set of Findings and Conclusions). App. C, at 22a, 27a-28a.

[8] Petitioner argued in a Supplemental Brief tendered to the Court of Appeals that his selective prosecution, and the failure of respondent to charge Newman, demonstrated that respondent was engaged in a campaign of retribution against him for his liberal politics and his pursuit of high-profile litigation against the vested interests of

printed in Appendix L, at 77a-78a; Mr. Newman's letter to victims is reprinted in Appendix M, at 79a-80a.

Petitioner testified that he objected to placing the advertisement and sending a letter to victims, but upon hearing from Newman that they both contained language that "[i]t is our policy not to take any cases except through Scottish or U.K. solicitors," told Newman to make his own decision. Tr. of Sept. 20, 1988, at 50-51. Kelly Newman confirmed that the final decision to run the advertisement and send the letter were his, and that after expressing reservations, petitioner left those decisions to Newman's discretion. *Id.* at 68-70. Newman also testified that based on his reading of this Court's decision in *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988), there could be no ethical violation as long as the letter and the advertisement clearly stated that "we were not taking any cases except through the solicitors." *Id.* at 75-76.

On July 16, 1988, the day after the press conference, the fact of petitioner's suspension and probation under the Agreed Judgment was first reported in the Scottish press. It was not disputed during the disciplinary proceedings that neither petitioner, nor anyone else connected with his trip to Scotland, ever spoke to or met with any victim or family members of a victim of the Piper Alpha disaster. Moreover, in every communication that was made to the public, they stressed that the Houston lawyers would discuss possible representation of victims only with Scottish or other United Kingdom solicitors. It was also undisputed that whenever petitioner discussed possible legal employment with a solicitor, he revealed to

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the Texas business and legal establishment. *See* note 2 *supra*. The Court of Appeals did not address those issues of selective prosecution and unconstitutional discrimination in violation of the Equal Protection Clause. *But cf.*, *O'Quinn* v. *State Bar of Texas*, 763 S.W.2d 397, 404 (Tex. 1988) (State Bar conceded that only plaintiffs' attorneys in personal injury cases ever had been charged with improper solicitation and Court observed that "this selective prosecution seems to enjoy the sanction of the State Bar Rules").

that solicitor the fact of his upcoming suspension and the terms of his probation. He told those solicitors that for the time being he would be referring cases to John O'Quinn. And contrary to the Findings of Fact made by the District Judge, App. C, at 23a, petitioner made such disclosures even before the first reports concerning the terms of the Agreed Judgment appeared in the Scottish press. *See* Tr. of Sept. 20, 1988, at 34, 42-43; Tr. of Oct. 17, 1988, at 271-73. Respondent presented no evidence that any solicitor or victim was in fact misled by any communication from petitioner or anyone associated with petitioner, nor did respondent make any showing that any of petitioner's statements were inherently misleading based upon past experience. Finally, no Piper Alpha cases were referred to petitioner or any other member of his "team."

D. The Hartman Matter.

In April, 1988, petitioner received a call from another Houston attorney regarding the potential claims of Ronald Hartman, a Vietnam veteran who had been exposed to Agent Orange and who had recently been diagnosed as suffering from lymphoma. Mr. Hartman's children also suffered from birth defects that the family believed were related to his exposure to dioxin. Petitioner met with the Hartmans in April and accepted from Mrs. Hartman a Power of Attorney authorizing petitioner to represent the family in connection with all claims relating to Mr. Hartman's exposure to Agent Orange. PX4. Because the Hartmans had not "discovered" their injuries until after the period to opt out of the New York Agent Orange class action litigation had expired, petitioner theorized that they, and others similarly situated, might not be bound by the terms of the class action settlement. But conscious of his obligation not to take on any new employment, and pursuant to the Agreed Judgment, petitioner informed Mrs. Hartman when she executed the Power of Attorney that he would refer her family's case to another attorney.

Within a few days, petitioner contacted Wayne Mansulla, an attorney with Ashcraft & Gerel in Washington, D.C., who had been actively involved in the Agent Orange litigation. Mr. Mansulla agreed to accept the Hartmans' case and to act as lead counsel for them and for other similarly-situated plaintiffs in a new class action lawsuit to be filed in Texas.

Petitioner next contacted his court-appointed custodian, Hartley Hampton, to inform him of the Hartmans' case. He explained to Mr. Hampton that, in a sense, the Hartmans were not "new" clients because petitioner had been counsel for the entire Agent Orange class. Nonetheless, petitioner felt the need to talk to his court-appointed custodian "personally, directly."

> I said the Hartmans have hired me and some others may be hiring me on some other manifestations of disease that have occurred recently in the Agent Orange situation and that I'm going to refer them to Mr. Mansulla. *He said no problem, just cover your bases.* Tr. of Oct. 17, 1988 at 233 (emphasis added).

Petitioner's testimony on this point was uncontradicted.[9]

On June 22, 1988, petitioner filed a class action on behalf of the Hartman family and others similarly situated in Jefferson County, Texas. He signed the complaint and obtained the permission of Wayne Mansulla and Tod Ensign, an attorney with Citizen Soldier, a New York-based veterans' rights organization, to sign their names as additional counsel for the plaintiffs. PX5. Petitioner participated in a press conference about the filing of the suit that was arranged by Citizen Soldier in Washington. On

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[9] The facts set out herein describing the *Hartman* case are drawn from the uncontradicted testimony of petitioner during the disciplinary proceedings conducted by the Distrct Court, testimony that was largely ignored by the trial judge and the Court of Appeals. Yet the respondent offered *no* evidence, from the Hartmans, from Mr. Mansulla, from Mr. Hampton (petitioner's custodian), or from anyone else to contradict that testimony. Petitioner's testimony is set out in the Tr. of Sept. 20, 1988, at 53-56 and Tr. of Oct. 17, 1988, at 228-38; 282-84; 289-95.

June 28, 1988 petitioner wrote to Mr. Mansulla formally referring him to a group of Texas clients involved in the new Agent Orange suit, including the Hartman family. Petitioner expressly asked Mr. Mansulla to pay any referral fees arising out of this case to his court-appointed custodian, Mr. Hampton, and to keep Mr. Hampton advised of further developments pertaining to the clients. DX8. On July 8, 1988, Mr. Mansulla responded to petitioner's letter, formally accepted referral of the Hartmans' case, and stated that he looked forward to hearing from Mr. Hampton about the arrangements for sharing fees in the matter. *Id.* On August 2, 1988, Mrs. Hartman executed a new Power of Attorney confirming that "WAYNE MANSULLA OF ASHCRAFT & GEREL, in Washington, D.C., by referral from THE LAW OFFICES OF BENTON MUSSLEWHITE, INC." had been employed as the Hartmans' attorneys. DX9.

Despite petitioner's efforts to comply with the Agreed Judgment, and to inform the court-appointed custodian of the Hartman matter, on July 19, 1988 both the custodian and the State Bar moved the District Court to conduct an oral hearing and take discovery concerning petitioner's recent actions, including his alleged solicitation of Piper Alpha victims, and his participation in the press conference at which Citizen Soldier announced the filing of the *Hartman* case. In their motion, Mr. Hampton and respondent alleged that by filing the *Hartman* suit, and participating in the press conference, petitioner "may have violated that provision of this Court's Judgment [that he 'shall accept no new employment by clients until November 1, 1988, although [he] may refer potential clients to other attorneys']." App. J, at 72a.[10] The mo-

[10] Petitioner testified that during the second week of July, Mr. Hampton, the custodian, and Mr. Smoot, counsel for the State Bar, requested a meeting with him about the *Hartman* case. Petitioner told Mr. Hampton, "if there's any question about whether I'm doing the proper mechanics I want to have a meeting. I don't want to have any problem." Tr. of Oct. 17, 1988, at 233. Mr. Smoot canceled the meeting and opted instead to bring the *Hartman* case to the atten-

tion also alleged that press reports had accused petitioner of "soliciting the survivors of the Piper Alpha tragedy to employ him to represent them in wrongful death or other types of tort actions." *Id.*

E. The District Court's Ruling.

After completing its investigation of the Piper Alpha matter and the circumstances surrounding the *Hartman* case, on September 12, 1988, respondent filed its Motion to Revoke Probation. That Motion alleged that petitioner's "acceptance of employment by the Hartmans and the class action claimants violated the terms of probation" in the Agreed Judgment. App. I, at 67a. Respondent abandoned its allegation that petitioner had solicited the Piper Alpha survivors; the Motion asserted instead that the Piper Alpha news release, the advertisement placed by Newman, and the letters Newman sent to a list of victims and their families were all "false and misleading" in violation of DR 2-101. *Id.* at 67a-69a.

Presiding Judge Casseb commenced trial on the Motion to Revoke Probation on September 20, 1988, *just one week after* petitioner was served with a copy of the Motion, and at a time when petitioner's retained counsel was in trial in another county. Judge Casseb rejected petitioner's request for a continuance, which was premised on obvious violations of petitioner's due process rights,[11] but did agree to recess the hearing for thirty days so that petitioner could conduct some discovery related to the charges, and obtain counsel to represent him.

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tion of the District Court. Mr. Hampton later informed Mr. Mansulla of the State Bar's assertion that petitioner had violated the terms of his Agreed Judgment by filing the *Hartman* case, causing Mr. Mansulla to withdraw from representation. *Id.* at 235. Petitioner then secured other attorneys possibly interested in accepting this referral. He testified: "Somebody tell me how to do it [refer the *Hartman* case], I'll do it." *Id.* at 236.

[11] This Court's decision in *Roller* v. *Holly*, 176 U.S. 398 (1900), holds that five days' notice of a contested hearing violates due process of law. In *In re Ruffalo*, 390 U.S. 544, 550 (1968), this Court held that in a disbarment action an attorney is entitled to procedural due process, "which includes fair notice of the charge."

Respondent presented its case against petitioner, and called petitioner to the stand as an adverse witness, on September 20, 1988. The District Court reconvened on October 17, 1988, and took additional evidence and heard arguments over the course of two days. The following day, October 19, 1988, Judge Casseb issued a letter order granting the respondent's Motion to Revoke Probation, and suspending petitioner from the practice of law for three years. App. B, at 16a-17a. The District Judge subsequently issued his dual sets of Findings and Conclusions on December 27 and 29, 1988.

The District Judge found that by having Mrs. Hartman execute a Power of Attorney in April, 1988, petitioner violated the terms of his probation. App. D, at 44a. The Court rejected petitioner's argument that the Hartmans already were his clients by virtue of prior Agent Orange class action litigation, and ruled that petitioner's subsequent referral of the Hartmans to Mr. Mansulla was of no consequence. *Id.* The Court ignored substantial expert testimony that petitioner's conduct in entering into an employment relationship with the Hartmans before referring their case complied with prevailing custom and usage. *See* note 23 *infra.*

The District Judge concluded that the Piper Alpha news release was false and misleading for the following reasons: *First*, it failed to identify the "term of internationally renowned U.S. lawyers based in Houston, Texas," and failed to identify the attorneys who were described in the release as "some of the best in the world in handling mass disaster litigation;" *second*, the statement that the team " 'would be working with UK solicitors to represent . . . victims . . .' is false and misleading because it suggested that [petitioner] or the team already had Piper Alpha clients . . .;" *third*, the designation of petitioner "as the 'team's lead counsel' is false and misleading because the release does not disclose" the terms of petitioner's probation and upcoming ninety day suspension; *fourth*, those same statements were false and

misleading because the true purpose of all concerned was that O'Quinn, rather than petitioner, would be lead counsel; and *fifth*, the reference to the attorneys on the team as " 'some of the best in the world in handling mass disaster litigation' is [a] false and misleading . . . statement of opinion as to the quality of legal services," not susceptible to reasonable verification. App. D, at 45a-46a.

In addition, Judge Casseb found in the news release an impermissible estimate of the range of recovery of damages. *Id.* at 46a.[12] And he noted that petitioner had failed to include a disclaimer in the release that he was not Board Certified by the Texas Board of Legal Specialization. *Id.* at 46a.[13]

Judge Casseb also concluded that petitioner was responsible for Newman's actions in taking out the newspaper advertisement and sending out the letters to victims. *Id.* at 46a-47a. He then made similar findings that both those publications were false and misleading in some of the same respects as the news release. *Id.* at 47a-48a.

Finally, Judge Casseb concluded that for *each* of the separate violations of the Disciplinary Rules he had found, petitioner's probation should be revoked and he should be suspended for three years. *Id.* at 48a-49a.

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[12] The news release contained no estimate of damages. It does quote petitioner as commenting: "The jurisdictional complexities and favourable punitive damages law make Texas the best place for suit to be filed by victims or victim's facilies . . . ." App. K, at 75a.

[13] Throughout the proceedings below no court ever reconciled the fact that whereas petitioner had not been "Board Certified" as a trial specialist, O'Quinn had been. Moreover, respondent did not offer, and the courts did not require, any evidence concerning the requirements for Board Certification, the relationship of those requirements to the problems posed by the prospective Piper Alpha litigation, or the interest, if any, that a Scottish solicitor would have in knowing that petitioner was not Board Certified and that O'Quinn was.

F. The Opinion Of The Court Of Appeals.

Petitioner sought supersedeas pending appeal, and expedited review by the state appellate courts. He was unsuccessful on both counts.[14] Petitioner's three-year period of suspension comemnced on January 31, 1989. Over a year later, the Fourteenth Court of Appeals issued its opinion affiming the District Court's ruling.[15]

The Court of Appeals rejected petitioner's argument that the Piper Alpha news release, letters and advertisements were not misleading in part because they had been directed to a sophisticated audience of Scottish solicitors. The Court, without reasonable explanation, stated that because the advertisement and letters would have been read by victims, and because the letter suggested that a victim could call Mr. Newman to give him the name of his solicitors, it followed that all three communications "[c]learly . . . were directed to the victims of the tragedy, not their solicitors." App. A, at 5a-6a. The Court next reejcted petitioner's argument that DR 2-101 is unconstitutionally vague. *Id.* at 6a-7a. With respect to petitioner's other federal constitutional arguments, which were grounded in this Court's rulings defining the First Amendment protection afforded to attorney advertising, the Court of Appeals simply begged off. It held that the Supreme Court of Texas had adopted DR 2-101, and it was not the function of an intermediate court to "nullify or alter it." *Id.* at 7a.

The Court of Appeals then affirmed the District Judge's findings that all the communications at issue were "false

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[14] Petitioner, acting *pro se*, sought relief from this Court based on the failure of the Texas State Bar Rules to provide for supersedeas pending appeal for a suspended attorney. *Musslewhite* v. *The State Bar of Texas*, No. 89-555, *cert. denied*, —— U.S. ——, 110 S.Ct. 503 (Nov. 27, 1989).

[15] The Court of Appeals opened its discussion of the facts by adopting the clearly-erroneous "finding" of the District Court that petitioner began calling Scottish solicitors about the Piper Alpha disaster on the day it occurred, which was two or three days before petitioner even knew about the disaster. App. A, at 2a. *See* note 4, *supra*.

and misleading" in failing to identify the team of lawyers and in making statements about the team that were not subject to reasonable verification; in implying that the team already had secured clients; in failing to disclose the terms of petitioner's probation and future ninety-day suspension; and in failing to include the required disclaimers concerning Board Certification at 7a-8a. The Court also affirmed the District Judge's conclusion that petitioner was fully responsible for Newman's actions in publishing the advertisement and mailing the letters. *Id.* at 8a-9a.

With respect to the *Hartman* case, the Court held that the Hartmans were new clients, and that petitioner's referral of them to Mr. Mansulla took place *after* he had filed suit on their behalf. *Id.* at 10a-11a. In so holding, the Court of Apeals ignored the undisputed facts that petitioner had obtained Mr. Mansulla's oral agreement to represent the Hartmans *before* the suit was filed, that the Hartmans had agreed to such a referral in April when they first met with petitioner, and that this was confirmed by the appearance of Mr. Mansulla's signature on the complaint itself.

With respect to petitioner's claim that the Agreed Judgment was unconstitutionally vague insofar as it prohibited him from accepting new employment but allowed him to refer potential clients to others, the Court held that this Court's decisions on the vagueness doctrine would not apply to the terms of a judgment agreed to by the petitioner. *Id.* at 11a. Moreover, the Court found no inconsistency between the terms of the Agreed Judgment and Texas DR 2-107, which seems on its face to require that an attorney be "employed" by the client before he is permitted to share in any fees with another attorney to whom he refers the client's case. *Id.* at 11a-12a. As for petitioner's reliance on the advice of the court-appointed custodian, who told him that his acceptance and referral of the Hartmans as clients were "no problem," the Court stated, without record citation and contrary to the record

facts, that "Musslewhite's representation that he planned to refer the case was false." *Id.* at 13a.[16]

The Court of Appeals also rejected all of petitioner's so-called "procedural complaints." It found no error in the District Court's refusal to continue the hearing, illogically concluding that the Motion to Conduct Hearing respondent filed in July gave petitioner "sufficient notice" of the charges that would be lodged against him in September. The Court also held that petitioner waived any due process error by accepting the thirty-day recess the District Judge granted for the completion of the hearing. *Id.* at 13a. Finally, even though the District Judge did not hold a separate hearing on the severity of the sanctions to be imposed, the Court of Appeals read Judge Casseb's mind and concluded that he had taken all the relevant factors into account in imposing a three year suspension. *Id.* at 14a-15a. In the last, inexplicable passage of its opinion the Court noted that "Musslewhite agreed to the three year suspension when he signed the agreed judgment . . . and cannot now complaint of the punishment to which he agreed." *Id.* at 15a.[17]

In spite of the near total abnegation of the function of appellate review evidenced by the Fourteenth Court of

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[16] In an opinion that bristles with unfounded statements about record facts, the quoted passage stands out. Not only was there no evidence presented in the District Court to support an accusation that petitioner did not intend to refer the *Hartman* case to Mr. Mansulla when he spoke with his custodian, but in fact, according to petitioner's uncontradicted testimony, he already had referred the case to Mr. Mansulla, and Mr. Mansulla had agreed to accept the referral. Neither Mr. Mansulla nor Mr. Hampton were called as witnesses by the State Bar. There is no reason to believe that respondent would have hesitated to do so if the State Bar believed that petitioner's testimony was not truthful.

[17] The Agreed Judgment, of course, did not dictate that *any* violation of the terms of petitioner's probation would result in a three year suspension. It states instead that in the event of a violation, "the Court *may* revoke such probation and impose a suspension from the practice of law for a period *not to exceed* three (3) years . . . ." App. H, at 59a-60a (emphasis added).

Appeals' opinion, including its decision to "pass the buck" on all First Amendment issues to the Supreme Court of Texas, that Court delayed ruling on petitioner's Application for Writ of Error for nearly seven months, and then denied it. A Motion for Rehearing was denied two months later. Thus, as of the date of this Petition, petitioner's First Amendment claims have not been addressed by an appellate court, although petitioner has endured two years and three months of the three year term of an unconstitutional suspension from the practice of law.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S SUSPENSION FROM THE BAR, BASED ON HIS COMMUNICATIONS DIRECTED TO SCOTTISH SOLICITORS, CANNOT BE SUSTAINED CONSISTENT WITH THIS COURT'S DECISIONS AFFORDING FIRST AMENDMENT PROTECTION TO SUCH COMMUNICATIONS.

This case presents this Court for the first time with the application of state bar disciplinary rules on advertising to communications between attorneys. Respondent accused petitioner of making "false and misleading" statements in order to attract referrals of Piper Alpha clients. Yet it was undisputed that petitioner scrupulously avoided any direct contact with those laypersons, and intended merely to establish a dialogue with their solicitors about the potential for Piper Alpha litigation in the courts of Texas. Respondent and the courts below failed to recognize the unique First Amendment issues posed by the sophistication of petitioner's intended audience, and by the State Bar's diminished interest in regulating the content of petitioner's statements to that audience. They erred in discounting completely the solicitors' ability to verify the accuracy of petitioner's statements, and to distill the facts, opinions and advice he provided for the benefit of their clients.

Moreover, the opinions of the District Court and the Court of Appeals totally ignore this Court's decisions, commencing with *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which afford First Amendment protection to

all forms of printed attorney advertising. *See Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (direct mailing to a targeted list of potential clients); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (newspaper advertisement designed to attract the attention of a targeted group of potential clients); *In re R.M.J.*, 455 U.S. 191 (1982) (announcement cards).[18]

In this case petitioner utilized a press release in an effort to inform the Scottish public that he was present in Scotland and was working with Scottish solicitors to explore the potential for filing an action in the Texas courts against the Texas-based petroleum companies involved in the Piper Alpha disaster.[19] The press release quoted petitioner as stating: "I would stress that my team will not accept any cases except through Scottish or UK-based solicitors." *See* App. K, at 75a-76a. The newspaper advertisement and letter to victims, although they were published over petitioner's objection, also made clear that the Houston attorneys would take no cases except through Scottish or other United Kingdom solicitors. App. L, at 77a; App. M, at 79a. The printed communications thus made clear that petitioner would accept no referral from a victim or family member, and would initiate no contact with them, absent further discussions and agreements with the victims' solicitors.

The fact that all three challenged communications were clearly designed to establish contact between petitioner's "team" of attorneys and the victims' solicitors is important for two reasons, both of which were ignored by the Texas courts.

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[18] This Court consistently has distinguished between all forms of written communications with prospective clients and face-to-face solicitation. *Compare Shapero*, 486 U.S. at 472 and *Zauderer*, 471 U.S. at 641-42, *with Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[19] Respondent presented no evidence at trial that the news release itself was disseminated to the public, nor that it was read or received by anyone other than the handful of local reporters who attended the press conference.

First, this Court observed in *Bates* that "[t]he determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." 433 U.S. at 383, n.37. "Thus, different degrees of regulation may be appropriate in different areas." *Id.* In judging whether the communications at issue were false and misleading, the Texas courts absolutely refused to judge whether petitioner's statements had any capacity to mislead the solicitors who were petitioner's intended audience. The reason is simple—nothing that was said in the three communications actually misled any solicitor (or for that matter, any victim or family member), and nothing that was said in print was not subject to reasonable vertification by a solicitor.

The ruling of the Court of Appeals in this case cannot be squared with the decision of the United States District Court for the Eastern District of Pennsylvania, which invalidated a state bar rule that forbade attorneys to represent to other attorneys, through a printed announcement, that they had any "special competence or experience." *See Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985). In *Spencer*, the Court held that "[l]awyers are capable of understanding, evaluating, and distilling legal advertisements and thus prohibiting plaintiff from making representations as to his background, education, and experience to other lawyers is unnecessary to advance any state interest and therefore unconstitutional." 579 F. Supp. at 892 (citing *Bates*, *supra*, 433 U.S. at 383 n.37). If the Court of Appeals in this case had applied *Spencer*'s analysis to the facts presented by petitioner's communications with Scottish solicitors, it would have concluded that the State Bar had no interest in regulating petitioner's statements in Scotland, let alone in suspending him from the practice of law for three years based on those statements. *See also Matter of Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979) (holding that attorney could not be suspended, consistent with *Ohralik*, for soliciting union members through the

"buffer" of the union's business agent, who possessed the expertise to evaluate the attorney's qualifications before passing along his name to the union members).[20]

Second, this Court also recognized in *Bates* that an advertisement "does not provide a complete foundation on which to select an attorney." 433 U.S. at 374. In the factual context of this case it was certain that a Scottish solicitor never would refer a Piper Alpha victim to petitioner or his group sight unseen. What petitioner hoped to accomplish through his printed communications was the establishment of a dialogue between himself and a group of Scottish solicitors concerning the prospects for successful litigation in the state courts of Texas. During the course of that dialogue, the solicitors were free to probe, and did probe, petitioner concerning those aspects of the printed communications that the Texas courts later found to be misleading or not subject to reasonable verification. Respondent presented no evidence that any solicitor (or victim) actually was misled by any of petitioner's statements. Yet petitioner was suspended from the practice of law for three years because of the presumed, but unproven, potential of his statements to mislead. *See Peel* v. *Attorney Registration & Disciplinary Comm'n*, —— U.S. ——, 110 S.Ct. 2281, 2287-88 (1990) (rejecting state's claims that the "potentially misleading" nature of an attorney's statements concerning his certification as a trial specialist by the National Board of Trial Advocacy warranted a categorical prohibition on their use).

In erroneously concluding that petitioner's statements were "false and misleading," without examining their context and without assessing the sophistication of the intended audience, the Court of Appeals also failed to fulfill its obligation as an appellate court to

> "'make an independent examination of the whole record' in order to make sure that 'the judgment

[20] The affirmance of *Spencer* by the Court of Appeals for the Third Circuit and the Michigan Supreme Court's decision in *Jaques* creates a conflict on this important federal constitutional issue within the meaning of this Court's Rule 10.1(b).

> does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 284-86 (1964)).

Milkovich v. *Lorain Journal Co.*, —— U.S. ——, ——, 110 S. Ct. 2695, 2705 (1990). *See also Peel, supra*, —— US. at ——, 110 S. Ct. at 2291-92 ("whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which . . . this Court should exercise *de novo* review"); *Ohralik, supra*, 436 U.S. at 463 (court "must undertake an examination of the record to determine whether [attorney's] conduct was constitutionally protected").

The record in this case is sparse. Respondent's sole evidence that petitioner's statements in the news release, advertisement and letter were false and misleading was based essentially on the words of the documents themselves. Each of the statements is reprinted in full in six pages of the Appendix to this Petition. *See* App. K, L & M, at 75a-80a. Respondent presented no other evidence to show how the statements at issue were in fact misleading, nor that the same types or categories of statements are inherently misleading. This failure of proof alone should have caused the Court of Appeals to reverse petitioner's suspension. *See In re R.M.J., supra*, 455 U.S. at 205-06.

From the record presented, it is clear that the application of the Texas Disciplinary Rules to petitioner's Piper Alpha communications was unconstitutional. Texas DR 2-101(A) prohibits a lawyer from making "on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services." It then defines a false or misleading communication to include a communication that:

> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading;
>
> * * * *

> (3) Contains a representation or implication regarding the quality of legal services which is not susceptible to reasonable verification by the public; [or]
>
> (4) Contains predictions of future success . . . .[21]

Texas' version of DR 2-101 also includes, in subparagraphs (B) and (C), requirements that all advertisements with regard to any specific area of the law include the name of the lawyer responsible for the performance of legal services in that area, and contain a statement whether or not that lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in that area. *See* App. G at 54a-55a.

These provisions of DR 2-101 were applied to petitioner in a manner that violated his constitutional right of free speech. First of all, the Texas courts never explained why the failure of the news release, letter or advertisement to identify all the members of the team from Houston was itself misleading. Petitioner plainly was identified in the news release he issued; Mr. Newman identified himself as the source of the advertisement and as the author of the letter. Their testimony that they subsequently, in meetings and other communications with Scottish solicitors, identified Mr. O'Quinn as a part of the "team" was uncontradicted.

The inference drawn by the Court of Appeals that statements that the team of attorneys from Houston "*would be working* with United Kingdom solicitors to represent . . . Piper Alpha [victims]" suggested that they already had secured Piper Alpha clients, and was therefore false and misleading, is inexplicable. Petitioner and

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[21] The complete text of DR 2-101 is set out in App. G, at 54a-55a. The District Court concluded that petitioner's statements violated sub-paragraphs (A)(1), (3), and (4). These provisions of DR 2-101(A) are not dissimilar to Rule 7.1 of the ABA Model Rules of Professional Conduct, currently in effect in Texas and many other states.

Newman were in fact "working with" a number of Scottish solicitors to discuss the potential for a lawsuit in the state courts of Texas, and they did in fact propose that they "would work with" those solicitors if a decision was reached to file that suit.

The published statements that petitioner was the "team's lead counsel" were not misleading. Petitioner had the special knowledge and expertise concerning the jurisdictional issues that were of importance to the Scottish solicitors, based on his handling of *Chick Kam Choo* and similar cases. Whether in fact he would be able to take on individual clients' cases would depend on the timing of the eventual decision to file suit, a decision that was premature. *See* note 6 *supra.* Moreover, whenever any of the solicitors spoke with petitioner about actually referring a client to him, petitioner disclosed to that solicitor the terms of his probation and upcoming ninety-day suspension.

The various references to the team as "experienced" or "among the best" in handling mass disaster litigation were mere "puffing" at worst, and essentially truthful. Both Musslewhite and O'Quinn had vast experience in these types of cases. Respondent never offered any evidence to the contrary. Moreover, such statements were susceptible to reasonable verification by the Scottish solicitors, many of whom had known and worked with petitioner on scores of cases over the course of more than a decade.

In short, a searching review of the record reveals that the statements at issue were not "false and misleading." Respondent and the state courts merely labeled the statements as such to avoid the obvious conclusion that all of petitioner's statements in Scotland were protected by the First Amendment.

Petitioner also was sanctioned for the failure of the press release, the advertisement and the letter to include disclosures that he was not board certified as a litigation specialist. The record presented by the respondent, how-

ever, is devoid of any evidence concerning the Texas Board of Legal Specialization and its requirements for certification as a specialist in litigation. There is no basis upon which this Court can judge whether the requirements for such certification are or would be meaningful to a Scottish solicitor seeking to retain an American lawyer to pursue an action in the United States arising out of the Piper Alpha disaster. This case thus represents the flip-side of this Court's recent decision in *Peel.*

Petitioner should not have been severely sanctioned for failing to include in communications to Scottish solicitors that he was not certified as a trial specialist in Texas, particularly when his qualifications, expertise and experience made him uniquely qualified to engage in the type of work he was discussing with those solicitors. The disclaimer requirements of DR 2-101(C), in the context of petitioner's communications directed to other attorneys in Scotland, were irrelevant and immaterial.[22]

The First Amendment issues presented by petitioner's case are important. Texas DR 2-101(A), like the current version of the ABA's Model Rule 7.1, defines a false and misleading communication as one that "omits facts necessary to make the statement considered as a whole not materially misleading." DR 2-101(A) also defines a misleading statement as one "not susceptible to reasonable verification." In this case, those vague definitions were applied to petitioner's legitimate activities in attempting to inform solicitors for injured Scottish victims of the Piper Alpha disaster of a possible alternative forum to seek redress of their injuries. The resulting sanctions cannot be squared with the principle that "'[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be

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[22] In fact, one commentator on the Texas rules has concluded that DR 2-101(C)'s requirement of a Board Certification disclaimer is always confusing, potentially misleading to the public, and advances no legitimate state interest. Rosenberg, *Texas Disciplinary Rule 2-101(C): The Fine Art of Disinformation,* 22 Hous. L. Rev. 909, 923-24 (1985).

deemed to have been on notice that the courts would condemn the conduct for which he was removed.'" *Zauderer*, *supra*, 471 U.S. at 653, n.15, *quoting In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring in result).

Furthermore, the Texas courts ignored the important fact that petitioner solicited no victims of the Piper Alpha disaster, and spoke to no one other than solicitors. His news release, and the letters and advertisements attributed to him by the respondent and the state courts, are thus much closer to the expressive and associational conduct that is entitled to full First Amendment protection under *In re Primus*, 436 U.S. 412 (1978), than to the commercial price advertising at issue in *Bates*, or the face-to-face solicition condemned in *Ohralik*.

The sanctions imposed on petitioner by respondent, and affirmed by the Texas courts, for alleged violations of DR 2-101, are much more severe than any this Court has considered in past attorney advertising cases. The Court of Appeals refused to address the important First Amendment issues presented by this case, deferring to the Supreme Court of Texas. That Court declined review. Thus, plenary review of the judgment below by this Court is essential, not only to vindicate petitioner's First Amendment rights, but to provide further clarification and guidance concerning the limits that must be imposed on state bar associations and state courts in attempting to sanction attorney communications that may conveniently be labeled as "false and misleading" under broad and vague definitions that are not consistent with the rights of all attorneys to engage in free expression.

II. IN SUSPENDING PETITIONER FROM THE PRACTICE OF LAW BASED ON HIS ACCEPTANCE OF THE HARTMANS AS CLIENTS AND REFERRAL OF THEIR CASE TO OTHER COUNSEL, RESPONDENT AND THE TEXAS COURTS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

It cannot be doubted that the rights of procedural due process must be afforded to attorneys facing grievance proceedings. *In re Ruffalo*, 390 U.S. 544, 550-52 (1968).

It is also a fundamental principle that a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

In confronting the situation posed by the Hartmans' case, petitioner knew that he was required by the Agreed Judgment to accept no new employment from clients until November 1, 1988, but he also knew that he was free to refer those clients to other attorneys, and to be paid a share of any eventual attorneys' fees for the referral. App. D, at 43a-44a. In making the referral, petitioner also was confronted with Texas DR 2-107(A)(1), which seems on its face to prohibit the payment of a referral fee to an attorney who is not "employed" by the client. *See* DR 2-107(A)(1) (requiring that the client consent to the "employment of the other lawyer" as one of three necessary conditions for the sharing of fees).[23]

In the face of the incongruity between the terms of the Agreed Judgment and DR 2-107(A)(1), petitioner consulted with the court-appointed custodian over his practice, and explained to him that he had been retained by the Hartmans, would be referring the matter to Mr. Mansulla, and would have Mr. Mansulla contact the custodian regarding the sharing of any fees. The custodian stated that he had "no problem" with this arrangement. *See* App. A, at 13a.

Despite petitioner's prompt disclosure of all that he was doing to the court-appointed custodian, and despite

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[23] DR 2-107(a)(1) is reprinted in full in App. G at 55a-56a. Substantial expert testimony was presented during the District Court proceedings that ordinarily a Texas attorney who refers a case to another lawyer and expects a referral fee must have been employed by the client. Thus, petitioner's actions in referring the Hartmans to Mr. Mansulla after accepting a Power of Attorney were consistent with prevailing custom and usage. *See* Tr. of Oct. 17, 1988, at 173-79; 297-308.

the fact that he did refer the Hartmans to Mr. Mansulla, he has been suspended from the practice of law for three years based in part on his "employment" by the Hartmans. The Court of Appeals has now held, retrospectively, that DR 2-107 does *not* require that a referring attorney must be employed by the client in order to receive a referral fee. App. A, at 11a-12a. That Court also has held that respondent should not have been estopped by the custodian's statements from seeking to revoke petitioner's probation, because petitioner never really intended to refer the case to Mr. Mansulla. *Id.* at 13a. The latter finding flies in the face of the record evidence that petitioner planned to refer the case when he first met with the Hartmans, immediately obtained their consent to do so, referred the case to Mr. Mansulla before the lawsuit was filed, and that Mr. Mansulla accepted the referral.

The violations of petitioner's due process rights implicated by respondent's treatment of the *Hartman* matter, by the failure of the state courts to estop respondent from disavowing the advice given to petitioner by the court-appointed custodian, and by the ambiguous and conflicting directions contained in the Agreed Judgment and in DR 2-107(A)(1) are of sufficient importance that this Court should grant plenary review of these issues, as well as the First Amendment issues raised by petitioner's suspension based on his Piper Alpha communications.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 7, 1991

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No. 90-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of the State of Texas

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Affirmed and Opinion filed February 8, 1990.

[STATE SEAL]

IN THE
FOURTEENTH COURT OF APPEALS

No. B14-89-00041-CV

BENTON MUSSLEWHITE,
Appellant

v.

THE STATE BAR OF TEXAS,
Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause Nos. 86-44452 and 87-24402

OPINION

Benton Musslewhite appeals from a judgment revoking his probation and suspending him from the practice of law for three years. In twenty-three points of error he claims the court erred in finding he had violated a disciplinary rule and in finding he had taken on a new client during the year in which he was prohibited from doing so. Musslewhite also asserts certain procedural errors. We affirm.

On November 10, 1987, the trial court called the original disciplinary actions against Musslewhite to trial. The parties announced to the court that they agreed to withdraw the original disciplinary actions, they waived trial by jury, and they agreed to a settlement. The trial court signed an agreed judgment on January 29, 1988. The judgment required that Musslewhite be suspended from the practice of law for ninety days beginning November 1, 1988. The court further suspended Musslewhite from the practice of law for three years. The court suspended the three year suspension and placed Musslewhite on probation for three years beginning January 31, 1989. Under the terms of the probation Musslewhite was prohibited, among other things, from committing professional misconduct as defined by the State Bar Rules and from accepting new employment until November 1, 1988. The court permitted Musslewhite to refer potential clients to other attorneys. The court further ordered that, "should Respondent violate any of the . . . terms or conditions of probation, the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three years[.]"

In September, 1988, the State Bar filed a motion to revoke Musslewhite's probation on two grounds. First, he improperly solicited victims of the Piper Alpha tragedy in Scotland. Second, Musslewhite accepted new employment during the period of time he was prohibited from doing so.

The Piper Alpha Allegations

An off-shore oil platform, known as the Piper Alpha, exploded in the North Sea on July 6, 1988. Beginning at approximately 10:30 that morning, Musslewhite began making telephone calls to Scottish solicitors to discuss a potential lawsuit. On July 15, 1988, Musslewhite made arrangements to go to Scotland to obtain cases arising out of the Piper Alpha tragedy. Before going to Scotland, Musslewhite talked with John O'Quinn about referring to

O'Quinn any cases he obtained in Scotland. Musslewhite also spoke with Kelly Newman to obtain his assistance in working on the Piper Alpha cases. Musslewhite gave Newman a list of solicitors and asked him to go to Scotland and telephone them.

When Newman arrived in Scotland he began to telephone the Scottish solicitors. When talking with the solicitors, Newman identified himself as working with "some of the best trial lawyers in Houston" who were investigating the Piper Alpha tragedy. He told them he was talking to solicitors about possible referral of cases for filing in the United States. He told them Musslewhite would be there in a few days to talk with them in person. Newman did not tell the solicitors that Musslewhite was prohibited from accepting new clients until November 1, 1988, or that he would be suspended from practicing law between November 1, 1988, and January 30, 1989.

When Musslewhite arrived in Scotland, two days later, he and Newman hired a public relations consultant named John MacDonald. MacDonald prepared a press release that day and issued it for Musslewhite. The press release referred to Musslewhite as the team's lead counsel, and stated that the team would be working with Scottish solicitors. The release described the unnamed members of the team as "internationally-renowned."

After the press release was issued, Musslewhite left for London while Newman stayed behind. Newman sent a letter addressed to "all victims or families of victims of the Occidental Petroleum Platform disaster." That letter said that Newman was acting on behalf of a "group of internationally renowned trial lawyers in the United States," and stated:

> The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so we can discuss the suit that we are

> bringing in the United States with him. If you have not retained a solicitor then we would advise that you do so as a matter of urgency and ask him to contact us so that we can discuss the action in the United States.

MacDonald, the public relations consultant, prepared the letter and prepared a newspaper advertisement for Musselwhite's group. Musselwhite knew about both communications and discussed them over the telephone with Newman. The advertisement MacDonald prepared stated that the team was willing to talk to "victims, families of victims, and their solicitors."

In its motion to revoke probation the State Bar claims that, by issuing the press release, the letters, and the advertisement, Musselwhite violated DR 2-101 [1] because certain statements in those communications were false and misleading. DR 2-101 provides:

> (A) A lawyer shall not make, on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (2) Contains a statement of opinion as to the quality of legal services;
>
> (3) Contains a representation or implication regarding the quality of legal services

[1] DR 2-101 was repealed effective November 1, 1989. The substance of the rule has now been codified in the SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS article 19, section 9 (Rules of Professional Conduct) Rule 7.01 (1989). We will apply the rules in effect at the time probation was revoked.

which is not susceptible to reasonable verification by the public;

(4) Contains predictions of future success;

(5) Contains statistical data which is not susceptible to reasonable verification by the public;

(6) Contains other information based on past performance which is not susceptible to reasonable verification by the public;

(7) Contains a testimonial about or endorsement of a lawyer;

(8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.

SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. 10, § 9 (Code of Professional Responsibility) DR 2-101 (1988).

The trial court found the press release, letters, and advertisement were false and misleading because they failed to identify the lawyers, because no team existed, because the communications suggested that Musslewhite already had Piper Alpha clients, because they did not disclose that Musslewhite could not take any cases, because Musslewhite predicted high recoveries in Texas courts, and because the advertisement did not contain a disclaimer stating that Musslewhite was not certified by the Texas Board of Legal Specialization.

In point of error one, Musslewhite contends the press release, letters, and advertisement were directed to solicitors, not the public; therefore, he did not violate DR 2-101. Musslewhite's contention is simply not true. The letters were mailed to the victims of the Piper Alpha tragedy and were addressed to "All Victims or Families of Victims of the Occidental Petroleum Platform Dis-

aster." Further, the advertisement stated, "[W]e respectfully suggest it is in your interest to have your solicitor call us immediately or that *you call us immediately* and give us the name, address and phone number of your solicitor or the solicitor you propose to employ." Clearly, the press release, letters, and advertisement were directed to the victims of the tragedy, not their solicitors. Point of error one is overruled.

In points of error two and three Musslewhite claims DR 2-101 is unconstitutionally vague. A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). The Fourteenth Amendment's Due Process Clause insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). This requirement applies with particular force in review of laws dealing with speech. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976). These guarantees apply fully to attorney disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968).

Appellant claims that DR 2-101 is unconstitutionally vague because it does not advise the attorney that he may be prevented from advertising to other lawyers in other countries. We do not find that DR 2-101 is unconstitutionally vague. It does not forbid conduct in terms that are so vague that people of common intelligence must guess at its meaning. The rule does not regulate communication with other lawyers. Contrary to appellant's contentions, he was not disciplined for communications with other lawyers, he was disciplined for false com-

munications to victims of the Piper Alpha tragedy. That activity is clearly prohibited by DR 2-101.

Moreover, the supreme court adopted DR 2-101 and the other State Bar rules as advertising guidelines to remove the uncertainty and confusion surrounding attorney advertising, solicitation, and trade names in the aftermath of *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). We presume the court intended that DR 2-101 comply with the restraints constitutionally permitted to prevent false, deceptive, or misleading advertising. Accepting the supreme court's inherent power to adopt the rule, it is not our function as an intermediate appellate court to nullify or alter it, for once the court decides on a rule of law, the decision is, in the absence of a controlling decision by the United States Supreme Court, binding on lower courts until the court changes the rule. *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964).

In points of error four through nine and eleven Musslewhite claims the evidence was insufficient to support findings that the press release, letters, and advertisement were false and misleading. He also claims that Newman acted alone in publishing the advertisement and mailing the letters. Musslewhite's insufficiency of the evidence points require this court to exercise our fact jurisdiction, and in so doing, we will apply the traditional test and consider all of the evidence to determine whether the verdict is clearly unjust.

First, Musslewhite claims the evidence does not show that the press release, letters, and advertisement were false and misleading. With regard to the press release, the recitation that a "team of internationally renowned U.S. Lawyers based in Houston, Texas" is misleading because it fails to identify any of the lawyers. Further, Musslewhite admitted that anyone reading the press release would not know who the team was. The release also states that the team "would be working with United

Kingdom solicitors to represent the victims or families of victims involved in the Piper Alpha tragedy." That statement is false and misleading because it suggests that Musslewhite, or the team, already had Piper Alpha clients, when they did not. The release refers to Musslewhite as the "team's lead counsel." That is misleading because the release does not disclose that the agreed judgment prevented Musslewhite from accepting new employment by clients and that he would be suspended for ninety days in the future. Finally, DR 2-101 requires a lawyer who publishes, advertises, or broadcasts with regard to any area of law to include a disclaimer stating that he is not certified by the Texas Board of Legal Specialization. The press release fails to include such a disclaimer.

The letter sent to the victims of the Piper Alpha tragedy also refers to a "group of internationally renowned trial lawyers in the United States" and is misleading because it does not identify the lawyers. Further, the statement that the team is "currently having discussions with a number of United Kingdom solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it suggests that the "team" already had Piper Alpha clients when it actually did not.

The advertisement that was published in the local Aberdeen paper contains similar misrepresentations. Again, the reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disaster in the United States of America and Europe" is misleading because it never identifies the lawyers and is not susceptible to reasonable verification by the public. The advertisement similarly does not contain a disclaimer. We find sufficient evidence that the press release, letters, and advertisement contained false and misleading statements.

Musslewhite also contends that Newman acted alone when in Scotland and, specifically, with regard to the

running of the advertisement and the mailing of the letters to the victims. The evidence shows, however, that Musslewhite telephoned Newman and asked that Newman work with him on the project. Musslewhite provided Newman with a list of solicitors and potential clients to telephone once he arrived. Musslewhite admitted that Newman discussed the advertisement with him over the telephone and that Newman showed him the letter before it was mailed. Newman testified that MacDonald drafted the advertisement based on information provided by Newman and Musslewhite. We find the evidence sufficient to show that Newman was working with Musslewhite when he published the advertisement and mailed the letters. Points four through nine and eleven are overruled.

In point of error ten Musslewhite claims he was entitled to have the allegations concerning the Piper Alpha matter processed through the grievance committee. To the contrary, the agreed judgment states that

> it is further ordered that should Respondent violate any of the . . . terms or conditions of probation, the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three (3) years[.]
>
> Either Petitioners, or the Office of General Counsel of the State Bar of Texas, shall file a written motion to revoke with the Court briefly describing the acts and conduct that gave rise to the claimed violation of probation[.]
>
> * * * *
>
> The Court shall decide without the aid of a jury whether Respondent violated any of the terms or conditions of probation[.]

The judgment to which Musslewhite agreed clearly provides that the court may act on the motion to revoke probation without referring the matter to a grievance committee first. Point of error ten is overruled.

The Agent Orange Case

Ronald Lee Hartman and his wife, Katherine H. Hartman, employed Musslewhite in April, 1988, to pursue claims resulting from Mr. Hartman's possible exposure to Agent Orange. Mrs. Hartman executed a power of attorney on behalf of Mr. Hartman and herself employing the Law Offices of Benton Musslewhite, Inc. Musslewhite filed the lawsuit on behalf of the Hartmans' on June 22, 1988. Musslewhite signed the petition and signed, by permission, the names Wayne Mansulla and Todd Ensign.

Musslewhite discussed associating Mansulla before suit was filed and orally agreed that Mansulla would assume the lead counsel. Later, after the custodian filed a motion to conduct an oral hearing on violations of Musslewhite's probation, the Hartmans signed a power of attorney with Mansulla. Mansulla subsequently decided to withdraw from the Agent Orange litigation. Musslewhite remained lead counsel in the Hartman case at the time the court's judgment revoking probation was signed. Musslewhite informed the Hartmans that he would be able to try the case, unless trial fell within his ninety-day suspension. The agreed judgment specifically prohibited Musslewhite from accepting new employment by clients until November 1, 1988.

In point of error twelve Musslewhite claims the Hartmans were not new clients so he did not violate the prohibition on accepting new clients. Musslewhite claims that, because the Agent Orange plaintiffs had already been certified as a class, the Hartmans were his constructive clients before they hired him in April, 1988. We disagree. The evidence clearly shows that Mrs. Hartman signed a power of attorney in April, 1988, which was during the period of time Musslewhite was prohibited from accepting new clients. Point of error twelve is overruled.

In points of error thirteen and eighteen Musslewhite claims that, to recover a referral fee, which the judgment allows, he had to be employed by the Hartmans. Musslewhite asserts that, after the Hartmans signed the power of attorney, he referred them to Mansulla. Musslewhite's averments are simply not true. In June, 1988, he filed an original petition for the Hartmans. At that point Musslewhite was the attorney to whom the court would look to be responsible for the trial of the case. He did not immediately refer the Hartmans to Mansulla nor did he accept employment simply to collect his referral fee. Further, the intent of the agreed judgment was to prohibit Musslewhite from accepting new employment, not to facilitate his recovery of referral fees. Points thirteen and eighteen are overruled.

In points fourteen, fifteen, and seventeen Musslewhite claims the clause preventing him from accepting new employment is unconstitutionally vague, in fatal conflict with DR 2-107,[2] imposes punishment not allowed by article 10, section 23(A) of the State Bar Rules, and violates DR 2-108.[3]

First, the vagueness doctrine applies to a *regulation* that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. at 391. The doctrine does not apply to a judgment on a disciplinary action to which Musslewhite agreed.

Musslewhite next complains that the referral clause in the agreed judgment conflicts with DR 2-107. Musslewhite claims that, to require referral by an attorney without being employed as an attorney, conflicts with DR 2-107. DR 2-107 provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or as-

---

[2] Now State Bar Rule 1.04.

[3] Now State Bar Rule 5.06.

> sociate of his law firm or law office, unless: (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

By that language, appellant attempts to show that he must be employed to refer a case. That simply is not what DR 2-107 means. DR 2-107 proscribes the division of attorney's fees with a nonpartner or nonassociate except under stated circumstances. The policy behind the rule is that persons represented by lawyers should be able to choose who finally represents them and the type of legal fees to be charged. *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.). The rule does not provide that, to collect a referral fee, the referring attorney must be employed by the client. The agreed judgment does not conflict with DR 2-107.

Appellant further claims the agreed judgment fatally conflicts with DR 2-108(B), which precludes a lawyer from entering into a settlement agreement that restricts the right to practice law. DR 2-108 states, "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law." A clear reading of section B reveals that the supreme court intended the prohibition on settlement agreements to apply to settlements on a client's behalf, not settlements of disciplinary proceedings. We do not find that DR 2-108(B) was meant to apply to an agreed judgment in a disciplinary action. The agreed judgment does not conflict with DR 2-108(B). Points fourteen, fifteen, and seventeen are overruled.

In point of error nineteen Musslewhite claims the State Bar was estopped from asserting that he improperly accepted employment from the Hartmans because the custodian appointed by the court advised Musslewhite that he had "no problem" with the manner in which Musslewhite referred the case. Musslewhite testified that he

talked to the court's custodian, Hartley Hampton, and stated that the Hartmans had hired him and that he planned to refer them to Mansulla. Musslewhite testified that Hampton replied, "[N]o problem, just cover your bases." Musslewhite bases his estoppel argument on that statement. We overrule Musslewhite's point of error because Musslewhite's representation that he planned to refer the case was false. Musslewhite did not immediately refer the Hartman case; therefore, Hampton's statement cannot be the basis for estoppel. Point nineteen is overruled.

In point of error twenty Musslewhite claims the evidence is insufficient to support a finding that he accepted employment. We find the evidence that the Hartmans signed a power of attorney with Musslewhite in April, 1988, and that Musslewhite filed suit for the Hartmans in June, 1988, sufficient evidence to show that he accepted new employment during the time he was prohibited from doing so. Point or error twenty is overruled.

Procedural Complaints

In point of error twenty-one Musslewhite claims he was denied procedural due process because he received the State Bar's motion to revoke probation only five days before the motion was heard. Although the motion to revoke was filed only five days before trial, the custodian filed a motion to conduct an oral hearing on July 19, 1988. The motion to conduct an oral hearing put appellant on notice of the charges he had to answer to the satisfaction of the trial court. The notice and opportunity to respond afforded appellant were sufficient to satisfy the demands of due process. Further, Musslewhite waived any error with regard to notice because the trial judge allowed him a thirty-day continuance to which he agreed. Point of error twenty-one is overruled.

In point of error twenty-two Musslewhite claims the trial court erred in not superseding the suspension while

his appeal is pending. The State Bar Rules provide that a court cannot supersede judgment of suspension:

> Either party to disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise.

SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. 10, § 24 (1989). *See also Wilson v. State*, 582 S.W.2d 484 (Tex. Civ. App.—Beaumont 1979, no writ). The trial court acted correctly in refusing Musslewhite's request that his suspension be superseded pending appeal. Point of error twenty-two is overruled.

In points of error sixteen and twenty-three Musslewhite claims that a three year suspension is excessive punishment. In a disciplinary proceeding, the punishment affixed is a matter for the exercise of the sound discretion of the trial court. *Daves v. State Bar of Texas*, 691 S.W. 2d 784, 790 (Tex. App.—Amarillo, 1985, writ ref'd n.r.e.). To determine the appropriate measure of discipline, the trial court may conduct a separate evidentiary hearing and shall consider, in addition to any other relevant matters:

> [T]he nature and degree of misconduct for which the respondent is being disciplined, the seriousness and circumstances attending the misconduct, assurance that those who seek legal services will be insulated from unprofessional conduct, the profit to the attorney or the injury or hardship to others resulting from the misconduct, avoidance of repetition, the deterrent effect upon others, the maintenance of respect for the honor and dignity of the legal profession, and the conduct of the respondent during the course of the investigation and trial of the dis-

> ciplinary action. In addition thereto, the disciplinary record of the respondent is admissible on the issue of the appropriate measure of discipline to be imposed.

SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. 10, § 23(B) (1989). Although the trial court held no separate hearing, we have reviewed the evidence and conclude that the trial court properly considered these and all the other relevant factors in imposing the three year suspension. Moreover, Musslewhite agreed to the three year suspension when he signed the agreed judgment. He cannot now complain of the punishment to which he agreed. Points of error sixteen and twenty-three are overruled.

The trial court's judgment is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed February 8, 1990.

Panel consists of Justices Pressler, Robertson and Sears.

Publish. TEX. R. APP. P. 90

APPENDIX B

[STATE SEAL]

SOLOMON CASSEB, JR.
SENIOR DISTRICT JUDGE

127 East Travis Street
San Antonio, Texas 76205

Area Code 512
223-4381

October 19, 1988

Mr. Theo W. Pinson
Greenwood, Koby, Old, Pinson & Bussey
1900 American General Tower
2727 Allen Parkway
Houston, Texas 77019

Mr. Steven Smoot
Mr. Craig Landin
c/o State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

Mr. Hartley Hampton
Attorney at Law
1301 McKinney, Suite 3400
Houston, Texas 77010

Re: Cause Number 86-44452
State Bar of Texas vs. Benton Musslewhite,
270th District Court, Harris County, Texas

Gentlemen:

The Motion to revoke the probation of Benton Musslewhite filed by the State Bar of Texas, was heard by the Court. The Court permitted all testimony, exhibits and arguments by all concerned. Thereafter, the Court, after reviewing the evidence and the authorities, is of the opinion and so rules that the Motion is granted. However,

Mr. Musslewhite shall be permitted to participate in the District Court Trial of the Reese case in Travis County.

Mr. Benton Musslewhite is hereby suspended from the practice of law for 3 years, beginning December 1, 1988.

Sincerely,

/s/ Solomon Casseb, Jr.
SOLOMON CASSEB, JR.
Judge Presiding

SCJr/am

CC: Mr. Ray Hardy
District Clerk
Civil Courts Building
301 Fannin Street
Houston, Texas 77002

APPENDIX C

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS

VS.

BENTON MUSSLEWHITE

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS

VS.

BENTON MUSSLEWHITE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after due consideration, makes the following Findings of Fact, which are in accordance with the undisputed or preponderance of the evidence and the following Conclusions of Law which are in accordance with the law of this State. They are:

1. That the Piper Alpha explosion occurred on July 6, 1988. Beginning at approximately 10:30 that morning, Benton Musslewhite began making telephone calls to Scottish solicitors to discuss the matter.

2. That Mr. Musslewhite went to Scotland on July 15, 1988. It was at his own instance; he was not invited and all of the contacts leading up to the trip were initiated by him.

3. That none of the contacts with Scottish solicitors between July 6 and July 13, 1988 concerning the Piper Alpha matter were initiated by the solicitors.

4. That Musslewhite did not inform any of the Scottish solicitors he called that there had been any limitation at all placed on his ability to practice law. He did not tell them that he was unable to accept new clients or that he would have to serve a ninety-day suspension that was scheduled to commence on November 1, 1988.

5. That in preparation for his trip to Scotland, Musslewhite discussed the Piper Alpha matter with John O'Quinn and Kelly Newman, both Houston attorneys.

6. That the first conversation with John O'Quinn occurred on or about July 11, 1988, and it resulted in an agreement that Musslewhite would refer to O'Quinn any cases that he obtained in Scotland. Musslewhite knew that he was barred from accepting new clients.

7. That one motive of Musslewhite's trip to Scotland was to obtain cases arising out of the Piper Alpha tragedy.

8. That during this time period, O'Quinn loaned Musslewhite money. O'Quinn had been loaning him money to pay his office overhead for sometime, in exchange for Musslewhite's agreement to refer cases to O'Quinn.

9. That Musslewhite and O'Quinn did not reach any agreement concerning the amount of referral fee that Musslewhite would be paid for any Piper Alpha case he procured. However, a written referral agreement providing for a 30-70 percent sliding scale fee division, had been in place between Musslewhite and O'Quinn for several years.

10. That after talking to O'Quinn, Musslewhite called Kelly Newman on or about July 10, 1988, and told him that he (Musslewhite) might be involved in the Piper Alpha case and wanted to know if Newman would be available to work on the case.

11. That Newman agreed to go to Scotland, with the understanding that Musslewhite was hiring him to help obtain and work on Piper Alpha cases. Newman believed that the primary purpose of the trip was to answer inquiries that might lead to employment in Piper Alpha cases.

12. That Newman and Musslewhite agreed that they would each bear their own expenses, and Newman understood he would receive some percentage of any fees realized from the Piper Alpha matter. Newman knew that Musslewhite could not pay him on a per diem basis. However, Musslewhite told Newman that if he were patient, the solicitors would ask Musslewhite and him to help them with the cases, and Newman would be "part of the team."

13. That Newman borrowed the money to finance his trip to Scotland from O'Quinn.

14. That Newman arrived in Scotland on July 13, 1988 and Musslewhite arrived on July 15, 1988.

15. That when Newman arrived in Scotland, on July 13, 1988, he stayed in the Imperial Hotel. Musslewhite had given him a list of solicitors to call and he started going down the list, making telephone calls.

16. That when Newman telephoned one of the solicitors, he identified himself as working with "some of the best trial lawyers in Houston" who were "investigating" the Piper Alpha incident. He told them he was talking to solicitors about possible referral of cases for filing in the United States. He told them Musslewhite would be there in a couple days to talk to them in person, and

gave the solicitors the impression that he and Musslewhite were acting in concert.

17. That Newman did not tell the solicitors he called that Musslewhite was the subject of a disciplinary order which prohibited him from accepting new clients until November 1, 1988, or that Musslewhite was suspended from practicing law between November 1, 1988 and February 28, 1989. However, Newman knew generally about the disciplinary order, and understood that it included those provisions.

18. That when Musslewhite arrived in Scotland on July 15, 1988 he and Newman decided that they needed to hire a public relations man. They jointly perused the telephone directory and selected P.R. Consultants, and specifically John MacDonald. MacDonald was hired on July 15, 1988. That same day, he prepared a press release issued on behalf of Benton Musslewhite, Inc. MacDonald suggested that a news conference be conducted, and he gathered between five and ten reporters at the Imperial Hotel.

19. That Musslewhite saw a rough draft of the press release and made one or two textual changes. He saw the final draft as he, Newman and MacDonald were walking into the press conference. He knew that a press release was going to be handed out and did not try to stop it.

20. That the press release referred to Benton Musslewhite as "The Team's Lead Counsel," and stated categorically that the team "would be working" with Scottish solicitors. It referred to Musslewhite's extensive experience in mass disaster litigation and described the team as "internationally-renowned." However, the group's members were not identified by name. The press release contains statements of opinion concerning Texas law and concludes "my team will not accept any cases except through Scottish or U.K.-based solicitors".

21. That at the ensuing press conference, nothing was said by Musslewhite or anyone else about the probationary order governing his law practice. Musslewhite did not disclose that he was prohibited from accepting new clients until November 8, 1988 nor did he mention the ninety-day suspension.

22. That on the same date, July 15, 1988, a letter was sent to "Solicitors of the United Kingdom who may be employed to represent victims or families of victims in the recent explosion on the Occidental Petroleum platform." This letter was written by Musslewhite.

23. That the letter contains extensive discussions of and opinions concerning Texas law governing punitive damages and forum non conveniens. It attempts to allay any concerns the local bar might have by emphasizing that neither Musslewhite nor "anyone else in my group of attorneys" will accept any cases except through solicitors. While it does not identify "team members" by name, it states that one member "has obtained the highest verdict ever for one family in a wrongful death case ($108 million dollars)" and thus, identifies O'Quinn.

24. That the letter makes no mention of Mr. Musslewhite's probation, his ninety-day suspension nor the prohibition against his accepting employment in new cases.

25. That interviews with Musslewhite appeared on "Up Front", "North Tonight", "Reporting Scotland", "Aberdeen Report" and the "Six O'Clock News" on July 15, 1988. These are Scottish radio and television programs.

26. That on "Up Front", Musslewhite gave opinions about the availability of a Texas forum and the fact that punitive damages in the amount of four times actual damages would be recoverable in a Texas forum. In "North Tonight" Musslewhite gave opinions about the value of the various cases, saying that a Million Pounds would be "far less than what I think we can recover in the American courts. . . ." On "Reporting Scotland", Musslewhite

said "we are here to assist if we can *any victim* or solicitor making a decision about whether they will file suit in the United States." (Emphasis added).

27. That on "Aberdeen Reports," he said that his "preliminary investigation" showed that punitive damages were in order in the Piper Alpha matter. This "preliminary investigation" consisted only of talking to some solicitors and reading about the Piper Alpha incident in the paper. In some of the same programs, he was quoted as saying that his team would work on a contingent fee basis, a practice that may not be legal under Scottish law. Kelly Newman discussed the fairness of the American contingent fee system in a separate interview on the "Six O'Clock News".

27. That Musslewhite did not mention the disciplinary judgment of this Court, the prohibition on his accepting employment or the ninety-day suspension in any of the broadcast interviews.

28. That by Saturday, July 16, 1988, the Scottish Press had learned of Musslewhite's disciplinary problems, and Scottish reporters began calling Houston to learn the terms of this Court's judgment. Articles ran in the Scottish papers beginning on Sunday morning, July 17, 1988, indicating that Musslewhite was in trouble with the Texas bar. By this time, Musslewhite had left Scotland for London and Portugal.

29. That prior to reports of this Court's disciplinary Judgment appearing in the Scottish Press, Musslewhite never told any of the solicitors with whom he spoke that he was limited in any way in his ability to practice law. He did not tell them about this Court's prohibtion against his entering into new attorney-client relationships nor the eminent ninety-day suspension.

30. That Musslewhite knew that he could not accept employment and that it would be misleading to lead anybody to believe that he could. Nevertheless, neither he nor

Newman disclosed this fact until it had been publicized by the Scottish press.

31. That on Saturday, July 16, 1988, Musslewhite left for London and did not return to Scotland; Newman stayed behind.

32. That while in London, Musslewhite called O'Quinn's office and discussed the fact that another law firm had sent a copy of the disciplinary judgment to Scotland and furnished it to several reporters. O'Quinn asked Mike O'Brien, formerly Judge of the 125th District of Harris County, Texas, to go to Scotland, and Musslewhite talked to O'Brien by telephone on or about July 19, 1988. Musslewhite wanted O'Brien to "reassure" the solicitors that Musslewhite's problems with the Texas bar would not affect the handling of the Piper Alpha cases since O'Quinn actually would be handling them, despite Musslewhite's status as "team leader."

33. That O'Brien is in private practice and he offices with O'Quinn, but he is neither a partner of, nor associated with O'Quinn. O'Brien left Houston on or about July 20, 1988, the Wednesday following the Aberdeen press conference. O'Quinn sometimes asks O'Brien to investigate sensitive situations, and he was concerned about newspaper articles describing Musslewhite's actions in Scotland. One such article ran in the Houston Chronicle on July 22, 1988, in which O'Quinn was quoted as saying that he has nothing to do with Musslewhite. "I'm not involved with it," he said.

34. That on or about July 18, 1988, O'Quinn told O'Brien, "I don't have time to go down there; I'm concerned what is being done in my name and not in my name and what my current situation is with the State Bar, and I'd like you to go over."

35. That about two days later, Musslewhite called O'Quinn while O'Brien was in O'Quinn's office and talked to them both on a speakerphone. Musslewhite "briefed"

O'Brien on the situation in Scotland. Musslewhite told O'Brien "there's been some adverse publicity, but I still think, you know, things can be resolved." Musslewhite was optimistic, despite the press reports of his disciplinary problems, that some cases could be "obtained."

36. That O'Brien arrived in Scotland on Thursday, July 21, 1988. He had dinner with Newman, and fortuitously met a solicitor named Frank McAteer in the hotel restaurant. They then retired to a pub next door.

37. That the following day O'Brien went shopping, sightseeing, and read the Scottish press clippings. He met with MacDonald and viewed a videotape of the press conference which he found to be "well-done". He called O'Quinn and reported that, in his opinion, things had "turned into one big mess. And given everything that's going on back over in the States with you, you want no part of this business, period."

38. That O'Quinn told O'Brien that Musslewhite would probably be calling him about going to Glasgow to visit some union solicitors. O'Quinn told him, "If he asks you to go, it is okay to go." Musslewhite called and O'Brien and Newman made the six-hour round trip train ride to Glasgow, where they met with Brian Fitzpatrick, James Stewart and Laura Walker for 30-45 minutes. Newman had already written to these solicitors and had sent them "brochures" from O'Quinn and Musslewhite.

39. That Newman and O'Brien agreed they told the solicitors that Musslewhite would probably associate O'Quinn in any Piper Alpha cases so that if Musslewhite lost his law license, O'Quinn could still handle them. O'Brien recounted his experience as a trial judge and discussed certain aspects of Texas law.

40. That after Musslewhite left Scotland for London and Portugal, Newman stayed behind and he sent a letter dated July 18, 1988 addressed to "all victims or families of victims of the Occidental Petroleum Platform disaster."

This letter said that Newman was acting on behalf of a "group of internationally renowned trial lawyers in the United States," and stated:

> The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so we can discuss the suit that we are bringing in the United States with him. If you have not retained a soliictor then we would advise that you do so as a matter of urgency and ask him to contact us so that we can discuss the action in the United States.

41. That MacDonald, the public relations man, had obtained a list of all of the victims, and this list was used to send the July 18, 1988 letter on behalf of the "team." MacDonald wrote the initial draft of this letter, and Musslewhite discussed the matter via telephone with Newman. Newman made the decision to send the letter, proofread and signed it. The letter was mailed to all victims and their families.

42. That MacDonald prepared a newspaper advertisement for Musslewhite's group. Musslewhite knew that it was gong to be run because that was the reason MacDonald was hired. The advertisement says that the "team" is wiliing to talk to victims, families of victims and their solicitors. . ." This advertisement was published on or about July 18, 1988.

43. That Houston attorney Gwynne Old referred the Hartman case to Mr. Musslewhite who told Old that Old would receive a referral fee. The Hartmans signed a Power of Attorney employing Musslewhite in April, 1988, but the day was blank.

44. That the petition, filed in Jefferson County on June 22, 1988, was signed by Musslewhite in a mannner that designates Musslewhite as lead counsel under T.R.C.P. 8.

45. That the petition filed on behalf of the Hartmans also asks that a class be certified, including all other Vietnam veterans injured by Agent Orange but not affected by the class action settlement. Musslewhite signed, "by permission", the names "Wayne Mansulla" of Ashcraft and Geral, and "Todd Ensign" of Citizen Soldier. A press conference was held the next day in Washington, D.C. to attract other potential class members.

46. That Musslewhite had discussed associating Mansulla before suit was filed, and an oral referral agreement had been reached whereby Mansulla would assume the lead-counsel role. The referral agreement was subsequently memorialized by a letter dated June 28, 1988.

47. That on August 2, 1988, the Hartmans signed another Power of Attorney identical to the earlier contract, except that Munsulla's name was substituted.

48. That Mansulla's firm subsequently decided to withdraw from the Agent Orange litigation. Musslewhite remained as lead counsel in the Hartman case at the time this Court's Judgment was signed. He told the client from very early in their relationship that he would associate other counsel, because of the size and complexity of the case primarily. But he also told the client he would be able to try the case, unless trial fell within his ninety-day suspension.

CONCLUSIONS OF LAW

1. Musslewhite has committed "professional misconduct" because his conduct in Scotland violates DR2-101, "Publicity and Advertising."

2. Musslewhite has violated DR2-101(A) by the following acts or omissions:

> a. By making false and misleading communications which contained material misrepresentations of law or fact in his news release, his press conference and

his en masse letter to the solicitors of the United Kingdom.

b. By making several statements that constituted statements of opinion and representations concerning the quality of legal services, such statements being not susceptible to reasonable vertification by the public,

c. By making predictions of future success and which were intended or likely to create an unjustified expectation about the results Musslewhite could achieve.

d. Musslewhite violated DR2-101(B) by repeatedly advertising, in the news release, press conference and en masse letter, the expertise of the American legal "team" while not identifying the team members by name.

3. Musslewhite and Kelly Newman acting in concert violated, the "Publicity and Advertising" rules.

4. In Scotland, Newman was acting in concert with Musslewhite.

5. The newspaper advertisement Newman and Musslewhite purchased violated the "Publicity and Advertising" rules by:

a. not identifying by name the "internationally-renowned team,"

b. omitting the material facts concerning Musslewhite's disciplinary judgment;

c. predicting higher recoveries including punitive damages, in Texas courts, and

d. making statements of opinion about the quality of legal services.

5. The July 18, 1988 letter Newman wrote to the victims, in concert with Musslewhite, violated the Publicity and Advertising Rules by:

a. not identifying by name the members of the "group of internationally-renowned trial lawyers,"

b. neglecting to mention the fact that one of this "internationally-renowned trial lawyers" was severely limited, by this Court's judgment, in his ability to practice law.

6. Musslewhite committed professional misconduct by failing to comply with DR 2-101(C)'s requirement concerning lack of board certification.

7. The Hartman case was "new employment" and Musslewhite violated this Court's Judgment by undertaking and accepting employment in that case.

SIGNED this 27th day of December, 1988.

/s/ Solomon Casseb, Jr.
Judge Presiding

APPENDIX D

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 20, 1988, the Court called the Motion to Revoke Probation filed by the State Bar of Texas, for hearing. Petitioners in the above-styled, numbered, and consolidated disciplinary actions are the Grievance Committees for State Bar District Nos. 4-A and 4-C, State Bar of Texas. Respondent is Benton Musslewhite. The Court heard evidence on September 20, 1988, and on October 17 and 18, 1988.

The Court, after considering the evidence, arguments of counsel, and authorities, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court called the original disciplinary actions to trial on November 10, 1987.

2. Petitioners in the original disciplinary actions were the Grievance Committees for State Bar District Nos. 4-A and 4-L, State Bar of Texas, and were represented by Steven M. Smoot, First Assistant General Counsel, State Bar of Texas, who announced ready for trial.

3. Respondent is an attorney licensed to practice law in the State of Texas and a member of the State Bar of Texas, and resides and offices in Houston, Harris County, Texas.

4. Respondent was represented by Ray Bass, who announced not ready.

5. The Court overruled Respondent's motion for continuance.

6. Respondent through this counsel then requested time to discuss potential settlement with the State Bar.

7. Chairman of the District 4-C Grievance Committee, Mark E. Lowes, then appeared.

8. Respondent, Bass, Lowes and Smoot thereafter engaged in settlement discussions.

9. The parties announced to the Court that they agreed to withdraw the original disciplinary actions from consideration by the Court, that they waived trial by jury, and that they agreed to a settlement.

10. A settlement was dictated into the record before the Court and the Court announced judgment thereon. (Court's Exhibit 1).

11. The parties submitted an agreed Judgment to the Court, which the Court signed on January 29, 1988.

12. The written Judgment of January 29, 1988 conforms with the agreement stated by the parties on November 10, 1987.

13. The portions of the judgment of January 29, 1988 relevant to the Motion to Revoke Probation are as follows:

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days, beginning on November 1, 1988, and ending on January 30, 1989.

IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with the recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.

IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS THEREFORE ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988 and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, § 7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioner's and Hartley Hampton a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of

record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

14. The terms and conditions of probation contained in the Jugdment of January 29, 1988 conform with the agreed terms and conditions of probation stated by the parites on November 10, 1987.

15. The terms and conditions of probation contained in the Judgment of January 29, 1988 are unambiguous.

16. Ronald Lee Hartman and his wife, Katherine H. Hartman, employed Respondent in April of 1988 to pursue claims resulting from Mr. Hartman's possible exposure to agent orange.

17. Mrs. Hartman executed a Power of Attorney on behalf of Mr. Hartman and herself employing the Law Offices of Benton Musslewhite, Inc. for such purpose. (Petitioner's Exhibit 4)

18. Respondent accepted new employment from the Hartman's as clients in April of 1988.

19. Gwynne Old, a Houston lawyer, referred the Hartmans to Respondent.

20. After Respondent accepted the Hartman employment, Respondent telephoned Wayne Mansulla, a Washington, D.C. lawyer, and asked him to be a lawyer in the Hartman lawsuit.

21. Respondent prepared, and filed on June 22, 1988, a Plaintiff's Original Petition in the 60th Judicial District Court of Jefferson County, Texas, under cause number B-129273, on behalf of the Hartmans. (Petitioner's Exhibit 5).

22. Respondent signed his own signature to the petition and also those of Mansulla and Todd Ensign, a New York lawyer.

23. Respondent participated in a news conference on June 23, 1988 to announce the filing of the Hartman lawsuit.

24. Respondent sent a letter to Mansulla on June 28, 1988, which was the first writing to or with Mansulla indicating that Respondent wanted Mansulla to work on the Hartman lawsuit. (Defendant's Exhibit 8).

25. The Hartmans did not execute a Power of Attorney employing Mansulla until after the Custodian and the State Bar filed their Motion to Conduct Hearing.

26. In the field of Texas plaintiffs personal injury practice, lawyers refer persons to other lawyers to handle the personal injury lawsuit and receive a portion of the ultimate attorney's fee recovered as a referral or forwarding fee.

27. Such a referring lawyer may have such person execute a contract employing the referring lawyer and then refer the person to another lawyer who handles the case.

28. Such a referring lawyer may also just refer such person to another lawyer who has such person execute a contract employing only the second lawyer who handles the case.

29. Referring lawyers receive referral fees without such persons entering a Power of Attorney or other employment contract with the referring lawyer.

30. Referring lawyers receive referral fees without performing legal services on behalf of such persons referred to other lawyers of the handling of their personal injury claims.

31. Respondent has referred persons to John O'Quinn.

32. John O'Quinn handled personal injury work either under the contract of the referring attorney or under his own contract.

33. On or about July 6, 1988, the Piper Alpha oil platform located in the North Sea off the coast of Aberdeen Scotland exploded, killing and injuring many men on the platform.

34. On or about July 8 or 9, 1988, Respondent learned of the Piper Alpha tragedy.

35. After learning of the tragedy, Respondent called a couple of Scottish solicitors that Respondent knew and discussed with them the potential of bringing suit against the American parent companies of the companies that owned or operated the Piper Alpha platform.

36. No Scottish solicitor invited or requested Respondent to come to Scotland.

37. No Scottish solicitor requested or engaged Respondent to represent any of the potential clients.

38. Respondent did not advise the Scottish solicitors he called of the terms of the Judgment of January 29, 1988.

39. Respondent called O'Quinn and asked O'Quinn whether O'Quinn would take any cases Respondent might secure out of the Piper Alpha tragedy.

40. O'Quinn told Respondent that O'Quinn would be willing to take on any such cases Respondent could get for O'Quinn.

41. O'Quinn intended to handle any such cases received from Respondent in his own law office as lead

counsel and if any attorneys fees were recovered, pay a percentage to Respondent as a referral fee.

42. Respondent asked O'Quinn about O'Quinn's opinion as to whether a Texas state court woud have jurisdiction over the parent corporations.

43. O'Quinn told Musslewhite that O'Quinn's opinion was that there was a good chance of maintaining jurisdiction of any such lawsuit in Texas state court.

44. O'Quinn also told Musslewhite that O'Quinn's opinion was that there was a good chance that any such lawsuit would not be dismissed for forum non conveniens in Texas state court.

45. Respondent also asked O'Quinn about O'Quinn's opinion as to what law a Texas state court would apply in any such lawsuit as to such issues as amount of damages and punitive damages.

46. O'Quinn told Musslewhite that O'Quinn's opinion was that determination of the choice of law in a Texas state court was not clear and that a Texas state court might apply Scottish law, which does not provide for punitive damages, or it might apply Texas law, which does.

47. Respondent determined to go to Scotland to seek Piper Alpha cases.

48. Respondent requested Kelly Newman, a Houston lawyer, to go to Scotland to assist Respondent in securing cases.

49. Kelly Newman agreed to go to Scotland to assist Respondent in securing cases.

50. Respondent and Newman intended that Newman share in any attorney's fees from any cases arising out of the Piper Alpha tragedy that were secured and sent to O'Quinn.

51. Respondent, O'Quinn and Newman were not law partners or otherwise in the same law firm.

52. O'Quinn did not tell Respondent or Newman that they could speak on behalf of O'Quinn.

53. A reason why Respondent requested Newman to go to Scotland with Respondent was because Respondent could only spend a couple of days in Scotland.

54. Newman borrowed $7,500.00 from O'Quinn to pay for Newman's expenses in travelling to Scotland.

55. Newman arrived in Scotland on July 13, 1988 and commenced calling a list of solicitors provided by Respondent to inquire as to whether they had any Piper Alpha cases.

56. Newman advised the solicitors that Respondent would be arriving in a couple of days to talk with any of them who wanted to talk to Respondent.

57. Respondent arrived in Aberdeen, Scotland on July 14, 1988.

58. Respondent and Newman employed John MacDonald, a public relations consultant, to assist them in publicizing their desire to secure Piper Alpha cases.

59. Respondent and Newman told MacDonald why they were in Scotland and what they wanted to accomplish.

60. Based on the information supplied to MacDonald by Respondent and Newman, MacDonald prepared a news release on behalf of Respondent.

61. MacDonald arranged for a news conference on July 15, 1988 for Respondent to announce why he was in Scotland.

62. Respondent reviewed and made a correction to the news release prior to the news conference.

63. Respondent proceeded to conduct a news conference with several members of the Scottish newspaper, radio and television press.

64. The news release was distributed to the press members at the news conference on July 15, 1988 with the knowledge of and at the behest of Respondent.

65. The news release is a false and misleading communication about lawyer services.

66. The news release was misleading because it failed to identify the "team of internationally renowned U.S. lawyers based in Houston, Texas."

67. The statement that the team "would be working with UK solicitors to represent the victims or families of victims involved in the Piper Alpha tragedy" is false and misleading because it suggested that Respondent or the team already had Piper Alpha clients, when in fact neither Respondent nor the alleged team ever had any Piper Alpha clients.

68. The description of Respondent as the "team's lead counsel" is false and misleading because the release does not disclose that the Judgment of January 28, 1988 prevents Respondent from accepting new employment by clients and that Respondent would be suspended for 90 days in the future.

69. The description of Respondent as the "team's lead counsel" is also false and misleading because the intentions of Respondent O'Quinn and Newman were that O'Quinn would be lead counsel, if not sole counsel.

70. The release is false and misleading because Respondent's purpose was to secure clients for O'Quinn to handle whereas the release suggested that Respondent was seeking clients for himself to handle.

71. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the release never identifies the lawyers.

72. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the release never discloses that the Judgment of January 29, 1988 prevents Respondent from accepting new employ-

ment by clients and that Respondent would be suspended for 90 days.

73. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the quote is a statement of opinion as to the quality of legal services.

74. Respondent's statement that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is not susceptible to reasonable verification.

75. Asking the lawyer making the representation or implication, to verify a representation or implication regarding the quality of legal services is not reasonable verification by the public.

76. Reasonable verification by the public of a representation or implication regarding the quality of legal services means verification from sources other than the lawyer making the representation or implication.

77. Release constitutes a publication, advertisement and or broadcast with regard to an area of law in which Respondent practices. (Petitioner's Exhibits 10 and 11).

78. The release fails to state the name of the lawyers responsible for the performance of legal services in the area of law broadcasted or to state "Not Certified by the Texas Board of Legal Specialization."

79. At the press conference, Respondent did not disclose the terms of the Judgment of January 29, 1988, and Respondent estimated a range of recovery for wrongful death cases between $1 million and $5 million in Texas state courts.

80. On July 16, 1988, the Scottish press learned of the Judgment of January 29, 1988.

81. The Scottish press thereafter contacted Respondent, verified that Respondent had previously been disciplined and reported Respondent's disciplinary problems.

82. On July 16, 1988, Respondent left Scotland for London.

83. Respondent left Newman in Scotland to continue efforts to secure Piper Alpha cases.

84. MacDonald also prepared an advertisement to be run in Scottish newspapers.

85. Newman reviewed the advertisement with Respondent before running it in newspapers.

86. The advertisement was run in the Scottish newspapers on behalf of Respondent's alleged "team." (Petitioner's Exhibit 2).

87. Respondent knew of the ad, knew it was going to be run, and permitted the running of the advertisement.

88. The advertisement is directed towards victims and families of victims, as well as Scottish solicitors who may already have cases.

89. The advertisement is false and misleading.

90. The reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is false and misleading because it never identifies the lawyers.

91. The reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is also false and misleading because it is not susceptible to reasonable verification by the public.

92. The advertisement invites people to call Newman directly if they have no solicitor.

93. Reference to "team now in Aberdeen" is false and misleading because Respondent was gone by then, O'Quinn never came to Scotland, and Newman is not an internationally renowned American lawyer experienced in han-

dling damage claims in mass disasters in the USA and Europe.

94. The advertisement constitutes a publication, advertisement or broadcast with regard to an area of law in which Respondent practices.

95. The advertisement does state who shall be responsible for the performance of the legal service in the area of law so advertised.

96. The advertisement fails to state "Not Certified by the Texas Board of Legal Specialization."

97. The running of the advertisement was another attempt by Respondent and Newman to procure cases for O'Quinn.

98. McDonald also prepared a form letter to be sent to the victims of families of victims of the Piper Alpha tragedy.

99. Newman discussed the sending out of the letter with Respondent.

100. The sending out of the letter was in continuance of the plan of Newman assisting Respondent in securing Piper Alpha cases.

101. Respondent permitted the letter to be sent to victims and families of victims of the Piper Alpha tragedy.

102. The letter was sent to the victims of the Piper Alpha tragedy on behalf of Respondent's so called "team."

103. The letter was false and misleading.

104. The reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it never identifies the lawyers.

105. The reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it is not susceptible to reasonable verification by the public.

106. The statement that the team is "currently having discussions with a number of UK solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it suggests that the team already had Piper Alpha clients.

107. The reference that the team is "currently having discussions with a number of UK solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it constitutes a prediction of future success.

108. The letter is false and misleading because Newman only had the right to represent Respondent, and not O'Quinn.

109. Respondent testified that he requested O'Quinn to come to Scotland to assure Scottish solicitors that Respondent's disciplinary problems would not affect O'Quinn's ability to handle any Piper Alpha cases.

110. In fact, O'Quinn asked Mike O'Brien, another Houston lawyer, to go to Scotland for the purposes of determining the effect of the adverse publicity concerning Respondent had had, and not to assure Scotish solicitors that O'Quinn could handle their cases.

111. O'Brien went to Scotland to the behest of O'Quinn to determine what was going on there regarding Respondent and O'Quinn.

112. O'Brien thereafter reported to O'Quinn that "things had turned into a big mess."

113. O'Quinn did not tell Respondent that Respondent could represent O'Quinn in Scotland.

CONCLUSIONS OF LAW

1. The parties announced a settlement of the original disciplinary actions in open court and dictated the agreement into the record on November 10, 1987.

2. The written Judgment of January 29, 1988 conforms with the agreement announced by the parties on November 10, 1987.

3. The written Judgment of January 29, 1988 is a final judgment.

4. All of the provisions of the Judgment of January 29, 1987 [sic] are in conformity with and are authorized by the State Bar Act and the State Bar Rules.

5. All of the provisions of the Judgment of January 29, 1987 [sic] are unambiguous and require no evidence to determine their meaning.

6. The terms and conditions of probation contained in the Judgment of January 29, 1988 conform with the agreed terms and conditions of probation stated by the parties on November 10, 1987.

7. The terms and conditions of probation contained in the Judgment of January 29, 1988 are unambiguous and require no evidence to determine their meaning.

8. The no new employment/referral of potential client condition of probation means that until November 1, 1988, Respondent could not agree to represent or represent any persons or clients that he did not specifically represent prior to February 1, 1988.

9. The no new employment/referral of potential client condition permitted Respondent only to send people whom Respondent did not represent, or enter a Power of Attorney with, to another lawyer.

10. The no new client/referral of potential client condition did not permit Respondent to sign a new client up to a Power of Attorney or to work on a new client's case.

11. Whether Respondent may receive a referral or forwarding fee out of the Hartman case is not an issue in the State Bar's Motion to Revoke Probation.

12. A lawyer may receive a forwarding fee for referring a person to another lawyer without the person entering into an employment contract or Power of Attorney with the forwarding lawyer, so long as the person consents to the ultimate fee division.

13. The Hartmans employed Respondent and Respondent accepted the employment by the Hartmans, in April of 1988.

14. The Hartmans were new clients.

15. The Hartmans were not prior clients because of the *Sharkey vs. United States* lawsuit or because of the Agent Orange lawsuit.

16. Respondent's acceptance of the Hartman employment violated the terms and conditions of probation.

17. The Motion to Revoke Probation should be granted based on such violation of probation.

18. Respondent should be suspended for three (3) years for such violation.

19. Respondent's filing of the lawsuit on behalf of the Hartmans violated the terms and conditions of probation.

20. Mansulla's or Ensign's agreement to work on the Hartman case did not change the fact that Respondent still represented the Hartmans in violation of the no new clients/referral of potential clients condition.

21. The Motion to Revoke Probation should be granted based on such violation of probation.

22. Respondent should be suspended for three (3) years for such violation.

23. Respondent is responsible for the news release of July 15, 1988.

24. The news release is a false and misleading communication about lawyer services, in violation of Disciplinary Rules 2-101(A) and 1-102(A)(4).

25. The news release was misleading because it failed to identify the "team of internationally renowned U.S. lawyers based in Houston, Texas," in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

26. The statement that the team "would be working with UK solicitors to represent the victims or families of victims involved in the Piper Alpha tragedy" is false and misleading because it suggested that Respondent or the team already had Piper Alpha clients, when in fact neither Respondent nor the alleged team ever had any Piper Alpha clients, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

27. The description of Respondent as the "team's lead counsel" is false and misleading because the release does not disclose that the Judgment of January 28, 1988 prevents Respondent from accepting new employment by clients and that Respondent would be suspended for 90 days in the future, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

28. The description of Respondent as the "team's lead counsel" is also false and misleading because the intentions of Respondent O'Quinn and Newman were that O'Quinn would be lead counsel, if not sole counsel, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

29. The release is false and misleading because Respondent's purpose was to secure clients for O'Quinn to handle whereas the release suggested that Respondent was seeking clients for himself to handle, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

30. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the release never identifies the lawyers, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

31. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the release never discloses that the Judgment of January 29, 1988 prevents Respondent from accepting new employment by clients and that Respondent would be suspended for 90 days, in violation of Disciplinary Rules 2-101 (A) (1) and 1-102 (A) (4).

32. The quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because the quote is a statement of opinion as to the quality of legal services, in violation of Disciplinary Rules 2-101 (A) (1) and 1-102 (A) (4).

33. Respondent's statement that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is not susceptible to reasonable verification, in violation of Disciplinary Rules 2-101 (A) (1) and 1-102 (A) (4).

34. Asking the lawyer making the representation or implication, to verify a representation or implication regarding the quality of legal services is not reasonable verification by the public.

35. Reasonable verification by the public of a representation or implication regarding the quality of legal services means verification from sources other than the lawyer making the representation or implication.

36. The release constitutes a publication, advertisement and broadcast with regard to an area of law in which Respondent practices and the failure to include the disclaimer violated Disciplinary Rule 2-101 (C) (2).

37. Respondent's estimate of the range of recovery of damages violated Disciplinary Rule 2-101 (A) (4).

38. Respondent is responsible for the actions of Kelly Newman in running the advertisement and sending the letter to the victims or the families.

39. Newman's actions in taking out the advertisement and sending out the letters was in furtherance of Respondent's plans and actions in seeking Piper Alpha clients.

40. Respondent knew of the running of the advertisement and the sending out of the letters on behalf of Respondent.

41. The advertisement is false and misleading, in violation of Disciplinary Rule 2-101(A).

42. The reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is false and misleading because it never identifies the lawyers, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

43. The reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is also false and misleading because it is not susceptible to reasonable verification by the public, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

44. Reference to "team now in Aberdeen" is false and misleading because Respondent was gone by then, O'Quinn never came to Scotland, and Newman is not an internationally renowned American lawyer experienced in handling damage claims in mass disasters in the USA and Europe, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

45. The advertisement constitutes a publication, advertisement and broadcast with regard to an area of law in which Respondent and Newman practice and the failure to include to disclaimer violated Disciplinary Rule 2-101(C)(2).

46. The letter was false and misleading, in violation of Disciplinary Rule 2-101(A)(1).

47. The reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it never identifies the lawyers, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

48. The reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it is not susceptible to reasonable verification by the public, in violation of Disciplinary Rule 2-101(A)(3).

49. The statement that the team is "currently having discussions with a number of UK solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it suggests that the team already had Piper Alpha clients, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

50. The reference that the team is "currently having discussions with a number of UK solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it constitutes a prediction of future success, in violation of Disciplinary Rule 1-102(A)(4).

51. The letter is false and misleading because Newman only had the right to represent Respondent, and not O'Quinn, in violation of Disciplinary Rules 2-101(A)(1) and 1-102(A)(4).

52. The Motion to Revoke Probation should be granted based on each of the foregoing violations of Disciplinary Rules.

53. Respondent should be suspended for three (3) years for each of the foregoing violations of Disciplinary Rules.

54. The Motion to Revoke Probation should be granted based on the news release.

55. Respondent should be suspended for three (3) years based on the news release.

56. The Motion to Revoke Probation should be granted based on the advertisement.

57. Respondent should be suspended for three (3) years based on the advertisement.

58. The Motion to Revoke Probation should be granted based on the letter.

59. Respondent should be suspended for three (3) years based on the letter.

60. Disciplinary Rules 2-101(A)(C) and 1-102 are constitutional.

61. The appointment of Hartley Hampton was proper.

62. All actions of Hartley Hampton have been proper and authorized by order of this Court.

63. The Judgment of January 29, 1988 does not require that an allegation of new professional misconduct as to Respondent must first go through a grievance committee and a disciplinary lawsuit before the State Bar can bring a motion to revoke probation.

64. Any bankruptcy proceeding did not stay the original disciplinary actions or this Motion to Revoke Probation.

SIGNED: December 29, 1988

/s/ Solomon Casseb, Jr.
Judge Presiding

APPENDIX E

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 28, 1990

The Honorable William W. Kilgarlin
Powell, Popp & Ikard
707 West Tenth Street
Austin, TX 78701

Mr. Frank J. Douthitt
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case No. C-9754
Style: BENTON MUSSLEWHITE
v. THE STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as amended, with the notation, "Writ Denied."

Motion for leave to file amended application was granted.

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Blanca Morin
BLANCA MORIN
Deputy

APPENDIX F

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 6, 1991

The Honorable William W. Kilgarlin
Powell, Popp & Ikard
707 West Tenth Street
Austin, TX 78701

Mr. Frank J. Douthitt
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case No. C-9754

Style: BENTON MUSSLEWHITE
v. THE STATE BAR OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Courtland Crocker
COURTLAND CROCKER
Deputy

APPENDIX G

DR 2-101. Publicity and Advertising.

(A) A lawyer shall not make, on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Contains a statement of opinion as to the quality of legal services;

(3) Contains a representation or implication regarding the quality of legal services which is not susceptible to reasonable verification by the public;

(4) Contains predictions of future success;

(5) Contains statistical data which is not susceptible to reasonable verification by the public;

(6) Contains other information based on past performance which is not susceptible to reasonable verification by the public;

(7) Contains a testimonial about or endorsement of a lawyer;

(8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.

(B) A lawyer who publishes, advertises, or broadcasts with regard to any area of the law in which he practices must, with respect to each area of the law so advertised, publish or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(C) Each lawyer whose name is either published, advertised, or broadcast pursuant to DR 2-101(B):

(1) Who has been awarded a Certificate of Special Competence by the Texas Board of Legal Spe-

cialization in the area so advertised must state with respect to each area, "Board Certified, (area of specialization)—Texas Board of Legal Specialization."

(2) Who has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with respect to each area, "Not certified by the Texas Board of Legal Specialization". Where the area so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

(D) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication media in anticipation of or in return for publicity in a news item, except that the provisions of this paragraph shall not prohibit payment of the cost of lawyer advertising permitted under this rule.

(E) A lawyer who makes or causes to be made any form of written, recorded or broadcast public communication shall retain a copy of same for a period of four (4) years from the date such communication is first made or caused to be made.

* * * *

DR 2-107. Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

APPENDIX H

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

JUDGMENT

On November 10, 1987, the Court called the above-styled, numbered, and consolidated disciplinary actions to trial. Petitioners, the Grievance Committees for State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee Chairman, and Respondent, Benton Musslewhite, appeared in person and by counsel. Petitioners announced that they withdrew the Fifth Amended Disciplinary Petition and would proceed on the Fourth Amended Disciplinary Petition. The parties announced to the Court that

they agreed to withdraw these disciplinary actions from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment as follows:

The Court finds that Respondent has committed professional misconduct as defined by the State Bar Rules art. X, § 7 and that this judgment shall encompass and dispose of all allegations of professional misconduct in the Fourth Amended Disciplinary Petition along with all other allegations of professional misconduct contained in any complaints pending with the State Bar of Texas, or of which the State Bar of Texas had knowledge prior to November 9, 1987. The Court determines that the appropriate sanctions for committing such professional misconduct is suspension from the practice of law for a period of ninety (90) days, plus suspension from the practice of law for a period of three (3) years, with suspension of imposition of the three (3) year suspension only and the placement of Respondent on probation for three (3) years.

The parties agree and the Court further finds that just cause exists to believe that the Court should appoint a member of the State Bar of Texas, pursuant to the State Bar Rules art. X, § 33.

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days, beginning on November 1, 1988, and ending on January 30, 1989.

IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with the recommendation of the Custodian, hereafter enter an order delaying commencement of the ninety (90) day suspension until no later than August 1, 1989.

IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988 and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, § 7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton a full and complete list of all of his clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

IT IS FURTHER ORDERED that should Respondent violate any of the foregoing terms or conditions of probation, the Court may revoke such probation and impose a suspension from the practice of law for a period not to

exceed three (3) years, aside and separate from the suspension already herein ordered, under the following procedures:

1. Either Petitioners, or the Office of General Counsel of the State Bar of Texas, shall file a written motion to revoke with the Court briefly describing the acts and conduct that gave rise to the claimed violation of probation;

2. A copy of such motion shall be served on Respondent pursuant to T.R.C.P. 21a at Respondent's last address shown on the membership rolls of the State Bar of Texas;

3. The Court shall conduct an evidentiary hearing on such motion within forty-five (45) days of the date that Respondent is served with a copy of such motion, at which time the State Bar of Texas shall bear the burden of proving its allegations to the Court under the Texas Rules of Evidence by a preponderance of the evidence;

4. After the date that Respondent is served with a copy of such motion and prior to the hearing, either party may invoke the discovery provisions of the Texas Rules of Civil Procedure;

5. The Court shall decide without the aid of a jury whether Respondent violated any of the terms or conditions of probation; and

6. Should the Court decide that Respondent has committed any violation, the Court may enter an order revoking the probation and imposing suspension from the practice of law for a period of three (3) years, commencing on or after the date of revocation, and aside and separate from the suspension already herein ordered, and/or the Court may also impose additional terms or conditions of probation, or lengthen the period of probation; and

7. Respondent shall have the right to appeal any order of the Court finding that Respondent violated any terms or conditions of probation, and revoking probation or

changing the terms, conditions, or period of probation, as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS ALSO ORDERED that the Court shall employ the provisions of State Bar Rules art. X, § 33 and appoint Hartley Hampton pursuant thereto.

IT IS FURTHER ORDERED that Hartley Hampton shall do the following:

1. Examine the client matters and files, and obtain information as to any pending matters which may be necessary to comply with his duties' under State Bar Rules art. X, § 33;

2. Notify Respondent's clients of the ninety (90) day suspension thirty (30) days prior to the commencement of the ninety (90) day suspension, inform them that they may seek other counsel or remain with Respondent, secure written statements from clients who wish to change attorneys, and arrange for the surrender or delivery of the papers or property of a client who decides to obtain other counsel.

3. With consent of the client, file such motions and pleadings and do such things on behalf of the client to further the client's legal rights;

4. Furnish the Court and counsel for Petitioners a written status report on Respondent's law practice every three (3) months, beginning on May 1, 1988 and continuing thereafter until November 1, 1991;

5. Review and approve all settlements, and settlement and distribution sheets, for Respondent's clients; and

6. Approve all payment of expenses or divisions of attorney's fees in any of Respondent's clients' cases.

IT IS FURTHER ORDERED that if the Court finds upon written application of Hartley Hampton, and after notice and hearing, that Respondent obtained legal em-

ployment in violation of a Disciplinary Rule, the Court shall order that Respondent shall forfeit any legal fees he may ever be entitled to arising from the employment, provided that Respondent shall have the right to appeal any order forfeiting legal fees as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS FURTHER ORDERED that Hartley Hampton shall be compensated at a reasonable rate to be established by the Court and to be paid out of attorney's fees accruing to Respondent.

IT IS FURTHER ORDERED that Respondent and Hartley Hampton shall be subject to further order of the Court relating to Respondent's law practice, after notice and hearing.

IT IS FURTHER ORDERED that all costs of Court shall be borne by the party who incurred same and that Petitioners shall recover no attorney's fees from Respondent.

SIGNED: January 29, 1988.

/s/ Solomon Casseb, Jr.
Judge Presiding

APPROVED AND AGREED TO:

OFFICE OF GENERAL COUNSEL
STATE BAR OF TEXAS

/s/ Steven M. Smoot
By: STEVEN M. SMOOT
First Assistant General Counsel
State Bar No. 18774300
P.O. Box 12487
Austin, TX 78711
512/463-1381
Attorneys for Petitioners

/s/ Benton Musslewhite
BENTON MUSSLEWHITE
State Bar No. 14752000
609 Fannin Street, Suite 517
Houston, TX 77002
713/222-2288
Respondent

/s/ Ray Bass
RAY BASS
State Bar No. 01884000
P.O. Box 237
Austin, TX 78767
512/478-2277
Attorney for Respondent

APPENDIX I

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

Movant, the State Bar of Texas, moves the Court to revoke the probation of Respondent, Benton Musslewhite, showing the Court:

I.

DISCIPLINARY JUDGMENT

A. On November 10, 1987, the Court called these disciplinary actions to trial. Petitioners, the Grievance Committees for State Bar District Nos. 4-A and 4-C, State

Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee chairman, and Respondent, Benton Musslewhite, appeared in person and by counsel. Counsel for Petitioners announced ready for trial. Counsel for Respondent announced not ready for trial. After the court overruled Respondent's Motion for Continuance along with various other dilatory motions, Respondent sought to enter into settlement negotiations. The Court permitted the parties to discuss prospective settlement. Thereafter, the parties announced to the Court that they agreed to withdraw this disciplinary action from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment pursuant to the agreement of the parties.

B. The Court signed a Judgment in conformity with the agreement of the parties, on January 29, 1988, providing, in pertinent part:

> IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days, beginning on November 1, 1988, and ending on January 30, 1989.
>
> IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with the recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.
>
> IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.
>
> IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.
>
> IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and

Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988 and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, § 7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential client to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

III.

AGENT ORANGE SUIT

In April of 1988, Ronald L. Hartman and Katherina H. Hartman employed Respondent to pursue claims resulting from Mr. Hartman's possible exposure to agent orange. Mrs. Hartman executed Power of Attorney on

behalf of Mr. Hartman and herself employing the Law Offices of Benton Musslewhite, Inc. for such purpose. On June 22, 1988, Respondent filed a Plaintiff's Original Petition in the 60th Judicial District Court of Jefferson County, Texas, under cause number B-129273, on behalf of "Ronald L. Hartman and Katherina H. Hartman and as Next Friend of Jeffrey Alan Hartman and Angela Marie Hartman, Both Minors Individually and as Representatives of Those Similarly Situated." After the filing of the lawsuit, Respondent proceeded to conduct a news conference to announce his filing of a new so-called "Agent Orange" lawsuit. Respondent's acceptance of employment by the Hartmans and the class action claimants violated the terms of probation.

III.

PIPER ALPHA TRAGEDY

A. On July 6, 1988, the Piper Alpha oil platform located in the North Sea far off the coast from Aberdeen, Scotland, exploded, killing or injuring some 166 men. After learning of the tragedy, Respondent contacted John O'Quinn, a Houston lawyer, about whether O'Quinn would handle any of the Piper Alpha cases in Texas courts, and Respondent states that O'Quinn agreed to accept clients procured by Respondent. O'Quinn has stated that he had nothing to do with Musslewhite being in Scotland. Respondent also contacted Kelly Newman, also a Houston lawyer, about going to Scotland with Respondent to seek Piper Alpha clients, and Newman agreed to go in anticipation of securing clients and receiving a portion of any eventual attorneys' fees.

B. On July 15, 1988, Respondent and Newman called a news conference in Aberdeen, Scotland where they distributed a news release, a copy of which is attached hereto as Exhibit "1." The news release is false and misleading. The reference to a "team of internationally renowned

U.S. lawyers" is false or misleading because the release never identified these lawyers. The statement that the team "would be working with U.K. solicitors to represent victims or families of victims involved in the Piper Alpha tragedy" is false or misleading because it suggests that the team already had Piper Alpha clients. The description of Respondent as the "team's lead counsel" is false or misleading because the release never discloses that the Judgment prevents Respondent from accepting new employment by clients and that Respondent will be suspended for ninety (90) days, and because Respondent's arrangement with O'Quinn was for O'Quinn to be lead counsel. The quote that the "team of attorneys I am leading are some of the best in the world at handling mass disaster litigation" is false or misleading because the release never identifies the lawyers, the release never discloses that the Judgment prevents Respondent from accepting new employment by clients and that Respondent will be suspended for ninety (90) days, and the quote is a statement of opinion as to the quality of legal services. The release also fails to name the lawyers responsible for the performance of the legal services in the area of law broadcasted or to state "Not certified by the Texas Board of Legal Specialization."

C. Respondent and Newman thereafter took out an advertisement in the local Aberdeen newspapers, a copy of which is attached hereto as Exhibit "2." The advertisement is false and misleading. Again, the reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team "are now in Aberdeen" is false or misleading because Respondent, who is not named in the advertisement, had already left Aberdeen, O'Quinn never was in Aberdeen regarding Piper Alpha, and Newman, who is the only lawyer named in the advertisement, is in no

fashion internationally renowned. The advertisement also fails to name the lawyers responsible for the performance of the legal services in the area of law advertised or to state "Not certified by the Texas Board of Legal Specialization."

D. Newman in concert with Respondent then mailed on behalf of the "team" form letters directly to the victims or their families, a copy of which is attached hereto as Exhibit "3." The letter is false and misleading. And again, the reference to a "group of internationally renowned trial lawyers in the United States" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team is "currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false or misleading because it suggests that the team already had Piper Alpha clients and because it is a prediction of future success. Furthermore, the Solicitors Practice Rules of 1987, a copy of which are attached hereto as Exhibit "4," which set out the ethical rules for Scottish lawyers with respect to advertising and solicitation, prohibit targeted, direct mail solicitation and would subject Respondent to discipline were he a Scottish solicitor.

Movant prays that the Court conduct an evidentiary hearing and thereafter determine whether Respondent has violated any terms of probation, and in which case enter an Order revoking probation and imposing suspension from the practice of law for three (3) years, and/or impose another additional terms, conditions, or length of probation the Court deems appropriate.

Respectfully submitted,

OFFICE OF THE GENERAL
COUNSEL
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711
512/463-1440

/s/ Steven M. Smooth
STEVEN M. SMOOT
First Assistant General
Counsel
State Bar Card No. 18774300

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Revoke Probation has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fannin, Suite 517, Houston, Texas 77002, by hand delivery and by certified mail, return receipt requested, and regular mail, by depositing them in properly addressed and posted wrappers with the United States Postal Service on September 12, 1988.

/s/ Steven M. Smoot
STEVEN M. SMOOT

APPENDIX J

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 87-244402 (Consolidated)

THE STATE BAR OF TEXAS

v.

BENTON MUSSLEWHITE

MOTION TO CONDUCT ORAL HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HARTLEY HAMPTON appointed Custodian of the law practice of Benton Musslewhite by this Court on January 19, 1988 and the State Bar of Texas, and file this Motion to Conduct Oral Hearing and in support thereof would show as follows:

I.

Movants have received oral reports, and news articles have been published by the Associated Press, Reuters news services and Scottish publications, which call into question

certain activities of Benton Musslewhite. Specifically, those reports and news accounts accuse Mr. Musslewhite of soliciting the survivors of the Piper Alpha tragedy to employ him to represent them in wrongful death or other types of tort actions.

If these accounts are true, Mr. Musslewhite has violated this Court's Judgment of January 29, 1988.

II.

Additionally, Mr. Musslewhite conducted a press conference in which he announced the filing of B129273, *Hartman, et al v. Diamond Shamrock Chemicals, et al*, 60th District Court, Jefferson County, Texas. This Court's Judgment of January 29, 1988, states:

> "2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent many [sic] refer potential clients to other attorneys;"

Accordingly, Mr. Musslewhite may have violated that provision of this Court's Judgment.

Given the potential gravity of the situation, Movants would ask that this Court conduct an oral hearing and receive testimony concerning Mr. Musslewhite's activities in Scotland and the circumstances surrounding the *Hartman* case, and Movants further pray that this Court compel Mr. Musslewhite to appear at such hearing and produce certain evidence. Specifically, Movants would ask the Court to compel Mr. Musslewhite to produce the following:

1. Any and all powers of attorney obtained from any potential parties to the Piper Alpha litigation and the *Hartman* litigation;

2. Any and all fee agreements between Mr. Musslewhite and any other attorneys pertaining to the Piper Alpha litigation and the *Hartman* litigation;

3. Any and all documents, as that term is used in the Texas Rules of Civil Procedure, pertaining to any "invita-

tions" by any parties to Mr. Musslewhite, asking that Mr. Musslewhite come to Scotland to visit with any persons concerning the Piper Alpha incident;

4. Any documents pertaining in any way to the financing of Mr. Musslewhite's July, 1988 trip to Scotland;

5. Any and all documents pertaining in any way to any press conferences Mr. Musslewhite conducted or in which Mr. Musslewhite participated in Scotland pertaining to the Piper Alpha tragedy.

6. Any documents pertaining in any way to his employment in the *Hartman* case, including the circumstances under which he was contacted by the Plaintiff; and

7. Any documents pertaining in any way to his referral of the *Hartman* case to any other attorneys, including any joint venture agreements with any other attorneys.

WHEREFORE, premises considered, Movants pray that this Court enter an Order by requiring Benton Musslewhite to appear at an evidentiary hearing to testify, under oath, concerning the circumstances of the above described events, and that this Court further order Mr. Musslewhite to produce the materials herein described.

Respectfully submitted,

By: /s/ Hartley Hampton
HARTLEY HAMPTON
State Bar No. 08874400
1301 McKinney, Suite 3400
Houston, Texas 77010
(713) 224-0934

/s/ Steven M. Smoot
STEVEN M. SMOOT
First Assistant General Counsel
State Bar No. 18774300
P. O. Box 12487
Austin, Texas 78711
(512) 463-1381

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing instrument has been forwarded by certified mail, return receipt requested, to Benton Musslewhite and his counsel of record at the addresses shown below on this 19th day of July, 1988.

/s/ Hartley Hampton
HARTLEY HAMPTON

Benton Musslewhite
609 Fannin Street, Suite 517
Houston, Texas 77002

Ray Bass
P. O. Box 237
Austin, Texas 78767

APPENDIX K

NEWS RELEASE
FOR IMMEDIATE USE

Aberdeen—15 July 1988. A team of internationally-renowned US lawyers based in Houston, Texas, revealed today that they would be working with UK solicitors to represent victims or families of victims involved in the Piper Alpha tragedy.

The team's lead counsel, Benton Musslewhite, has been extensively involved in mass disasters. These include the Ranger I disaster, Ocean Ranger sinking, Agent Orange litigation, Harris County Dumpsite cases and the Amarillo Cotton Farm disaster.

The defendants likely to be involved in Piper Alpha litigation all have their corporate headquarters in the US, with a number of these being in Texas. This is significant because the Texas state courts are open to foreign as well as domestic plaintiffs and litigation pursued through state, rather than federal, courts is usually more successful.

Until recently, there had been some law to the effect that the state courts would have to apply the federal forum non conveniens law. However, a recent case before the US Supreme court won by Mr. Musslewhite means that Texas can retain its own jurisdiction when dealing with actions raised by foreign plaintiffs.

"The jurisdictional complexities and favourable punitive damages law make Texas the best place for suit to be filed by victims or victim's families of this tragedy," commented Mr Musselwhite.

"I would stress that my team will not accept any cases except through Scottish or UK-based solicitors.

"The team of attorneys I am leading are some of the best in the world at handling mass disaster litigation and

one of our hallmarks is that we work to obtain a recovery or a settlement on a separate, individual basis.

"We will not allow any packaging of settlements in group lots. The tragic aspect of packaging settlements, which has been customary in mass tragedies handled by some other attorneys, is that the persons with the greater damages are penalised for the benefit of those with lesser damages.

"It is our belief that each client's case stands on its own footing and the value of each client's case must be separately considered and finalised. I think this is important to clients."

Ends 15 July 1988

Issued on behalf of Benton Musslewhite Inc. by John Macdonald, PR Consultants Scotland. Tel 0224 325326 (office), 0224 311448 (home).

Further information:

Kelly Newman
Tel: Aberdeen (0224) 589101.

APPENDIX L

PIPER ALPHA DISASTER

DAMAGE CLAIMS

A team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe are now in Aberdeen and willing to talk to victims, families of victims and their solicitors in respect of claims arising from the Piper Alpha disaster.

Our team includes the attorney who handled the recent case in which the US Supreme Court established the right of foreign plaintiffs to have jurisdiction in the state courts in America determined under state law rather than federal law, and the attorney who obtained the largest verdict ever for one family in a wrongful death case (over £50 million).

We believe the best courts for pursuing claims are the state courts of Texas and Louisiana, because we believe we can retain jurisdiction over cases in these courts and that the recoveries possible will be substantially higher and we can recover punitive, as well as actual, damages in those courts. We believe the Piper Alpha disaster is one in which punitive, as well as actual, damages should be awarded.

We totally agree with the sentiments expressed by the offshore oilmen's unions that every possible step should be taken to guarantee the safety of workers' offshore. This can be achieved partly through union recognition, but also through the pursuit of punitive damage claims which will force oil multinationals to adopt stronger safety measures.

We understand that the Scottish Law Society has warned against directly employing U.S. attorneys and our team agrees with those suggestions. It is our policy not to take any cases except through Scottish or U.K. solicitors.

However, we understand that there has been a suggestion by some Scottish solicitors that only one American law firm handles all cases. We respectfully suggest that it is not in the interest of victims or their families to pool all cases into one American firm, any more than it would be good to pool all cases into one U.K. firm.

There has been a trend among some American Attorneys to package cases for settlement purposes. We do not believe this is a good practice. Packaging cases means that the better cases are penalized for the benefit of the less valuable cases. We believe it is our solemn duty to see to it that each case is settled separately on an individual basis and not packaged for settlement purposes, as so many other American firms are prone to do.

Therefore, we respectfully suggest it is in your interest to have your solicitor call us immediately or that you call us immediately and give us the name, address and phone number of your solicitor or the solicitor you propose to employ. The call should be made to Kelly Newman, Aberdeen 589101 (Room 215, Imperial Hotel, Stirling Street, Aberdeen). Please leave your name and telephone number if for any reason I am not there or my line is busy.

Kelly Newman
of Houston, Texas

APPENDIX M

LAW OFFICE
OF
KELLY L. NEWMAN
ATTORNEY AT LAW
350 North Belt Suite 234
Houston, Texas 77060
(713) 448-1173

July 18, 1988

All Victims or Families of Victims of the Occidental Petroleum Platform Disaster

I am an American attorney and I represent a group of internationally renowned trial lawyers in the United States. We are currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages for the victims and/or their families.

I know you have seen a great deal of publicity about American lawyers and that you have been advised by your own solicitor or lawyer. We agree with that advice and we will not accept any cases except through your own solicitor or lawyer.

The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so that we can discuss the suit that we are bringing in the United States with him. If you have not retained a solicitor then we would advise that you do so as a matter of urgency and ask him to contact us so that we can discuss the action in the United States.

I will be at the Imperial Hotel, Stirling Street, Aberdeen (tel: 0224 589101) for all of this week. If for any reason you have not retained a solicitor until after I leave

Scotland, please call me at my office in Houston, Texas (tel: (713) 448 1173).

With kind regards,

/s/ Kelly Newman
KELLY NEWMAN

APPENDIX N

Law Offices of Benton Musslewhite, Inc.
Counselors at Law
609 Fannin
Suite 517
Houston, Texas 77002
(713) 222-2288

July 15, 1988

Dear Mr. ————————

To Solicitors of the United Kingdom Who May Be Employed to Represent Victims or Families of Victims in the Recent Explosion on the Occidental Petroleum Platform.

The purpose of this letter is to give you some information that might be helpful to you in deciding whether or not you want to attempt to protect your client's rights in the courts of the United States. As you probably already know, there are several potential defendants which include Occidental Petroleum Corporation and its various subsidiaries. These include its UK subsidiaries; a group of companies based in Houston, Texas, Union of Texas and its subsidiaries, who were part owners of the platform; J. Ray McDermott and its subsidiaries and parent corporation, who were the designers and builders of the platform; and other potential defendants.

These defendants have their overall base of corporate operations in the United States, with the McDermott group of companies being based in New Orleans, Louisiana and the Union of Texas group of companies being based in Houston, Texas. The location of the companies involved in this tragic accident is of prime importance. Because at least one or more of the companies are based in Texas and Louisiana, suit can be brought in either one of the state courts of those states.

It is extremely important that, if litigation is going to be pursued in the United States, such litigation should be pursued in the state courts rather than in the federal

court system. This is because the federal law, with regard to jurisdictional matters, including the doctrine of forum non conveniens, is extremely bad. (See *Piper vs. Reyno*, 454 U.S. 235 (1981).)

On the other hand, both Texas and Louisiana take the approach that their state court forums are open to all foreign plaintiffs as well as to domestic plaintiffs, and it seems clear that jurisdiction can be retained in the state courts of either one of those states as long as one of the defendants is domiciled there. (With respect to Texas, see *Alfaro vs. Dow Chemical*, No. 01-87-00700-CV, (1st. Ct. of App. Tex. 1988).)

Until recently, there had been some law to the effect that the state courts would have to apply the federal forum non conveniens law but this threat was laid to rest by a case I handled before the Supreme Court of the United States. I argued the case on March 30, 1988 and the Supreme Court of the United States handed down its decision on May 16, 1988 in the case of *Chick Kam Choo vs. Exxon*. A copy of that decision is attached.

There, in that case, the Supreme Court reversed the Court of Appeals for the Fifth Circuit and held that each state court can decide the forum non conveniens issue in accordance with its own law.

Therefore, I am happy to report to you that, if you are representing victims or victim's families arising out of the tragedy on the Occidental platform, you have the option of filing suit in the state courts of Texas or Louisiana and it is my opinion that jurisdiction will definitely be retained in either one of those forums.

It is my recommendation that suit be filed in the state court of Texas, not just because I have my home office in Texas but because Louisiana does not have as favourable a punitive damages law as does Texas. The Texas law is reflected in *Burk Royalty vs. Walls* 616 S.W.2d 911 (Tex. Sup. Ct. 1981). Moreover, Texas has extremely favourable actual damages, in wrongful death cases, generally

classified as soft or "loss of society" damages (these are damages that allow much greater recoveries than just "economic" loss). This is reflected in *Sanchez vs. Schindler* 651 S.W.2d 249 (Tex. Sup. Ct. 1983). From what I already know of the facts of this case, there is a very good chance that we could prove gross negligence with regard to this tragic accident and therefore recover punitive damages under Texas Law. Since Scotland has no punitive damages law, generally speaking, there would be no reason for the Texas state court not to apply the Texas punitive damages law, under a conflict of law analysis. (See *Duncan vs. Cessna Aircraft* 665 S.W.2d 414 (Tex. Sup. Ct. 1984).) *This being the case, it is quite clear that the potential actual and punitive damages recoverable in the state courts of Texas are greater than in any other jurisdiction and, as I have stated, it seems clear to me that jurisdiction can be retained in the state courts of Texas.*

I understand that there is a strong movement to have all of the Scottish solicitors join together and hire one American law firm. *I want to make one thing clear at the outset and that is that neither I nor anyone in my group of attorneys will accept any cases except through Scottish or U.K. solicitors.* This has been my practice for the last several years and that will be our practice in this particular situation.

What we want to do is to offer the Scottish and U.K. solicitors an alternative. The group of attorneys I am working with are some of the best in the world at handling mass disaster litigation. One of the members of our group has obtained the highest verdict ever for one family in a wrongful death case ($108 million). I was one of the co-lead counsel in a case where we obtained $21.6 million for seven Greek families in a maritime case tried in Beaumont, Texas. More importantly, I can justifiably point to my expertise in the field of forum non conveniens or jurisdictional law. Some of you may recall the well-known *Castanho* case, which has established some prece-

dent here in the United Kingdom, having gone all the way up to the House of Lords. After winning the case in the United Kingdom, thus clearing the way to sue in the United States, a $3 million settlement was obtained after six days of trial in the United States. (See *Castanho vs. Jackson Marine* 650 Fed. 2d 546 (5th Circuit 1981)—a copy is attached.

The hallmark of our group will be that we consider each case separately and will work to obtain a recovery or a settlement on a separate, individual basis. We will not allow any packaging of settlements in group lots. The unfair aspect of packaging settlements, which has been customary in mass tragedies handled by some *other* attorneys, is that the persons with the greater damages are penalized for the benefit of those with lesser damages. It is our solemn belief that each client's case stands on its own footing and the value of each client's case must be separately considered and separately finalized. I think this is important to the clients.

While I know there is a strong movement toward having one American firm handle all the cases, I frankly do not think that this is in the best interests of the clients to have all their cases handled in a package.

Therefore, if you are interested in joining our efforts to obtain justice for the victims in the state courts of Texas please call me. Call the Imperial Hotel in Aberdeen and ask for either myself (I will only be here for two days) or Mr. Kelly Newman who will be here for the remainder of this week. The phone number is Aberdeen 589101. If any of you would like to meet and discuss any of these matters I would be most happy to do so.

A copy of decisions cited herein but not attached will be furnished upon request.

Yours sincerely

Benton Musslewhite

Kelly Newman
of Houston, Texas.

Supreme Court, U.S.
FILED
JUN 5 1991
OFFICE OF THE CLERK

(3)

No. 90-1708

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Sheila R. McIlnay
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BEST AVAILABLE COPY

LIST OF PARTIES

The parties in the Texas courts were the parties listed in the caption to the Petition.

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OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals of the State of Texas is reported at 786 S.W.2d 437 (Tex.App.--Houston [14th] 1990, writ denied), and is reprinted in Petitioner's Appendix A of Petition, at 1a-15a.

On November 28, 1990, the Supreme Court of Texas denied petitioner's application for writ of error to the Fourteenth Court of Appeals. That Order is reprinted in Appendix E, at 50a-51a. On February 6, 1991, the Supreme Court of Texas denied petitioner's timely motion for rehearing of the application for writ of error. That Order is reprinted in Petitioner's Appendix F, at 52a-53a.

OBJECTION TO JURISDICTION

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons thereof. Supreme Court Rule 17.

Respondent, the State Bar of Texas, submits that while neither controlling nor fully measuring the Court's discretion, Petitioner Musslewhite has not met any of the character of reasons set forth in Rule 17(b)(c) to invoke the jurisdiction of this Court.

Neither the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, Houston, Texas in its published opinion, nor the Texas Supreme Court in refusing to grant Musslewhite application for writ of error either (a) decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of

appeals; or (b) decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The case at hand involves the suspension of an attorney from the practice of law resulting from the revocation of an agreed judgment of probated suspension for violations of the probationary terms of the agreed judgment. The decision of the trial court which was affirmed on appeal found that Petitioner Musslewhite violated DR 2-101 by engaging in false and misleading advertising and for taking on a new client during a time when he was prohibited from doing so.

The judgment of the Court of Appeals correctly found that Musslewhite was disciplined for false and misleading communications to victims of the Piper Alpha tragedy and not for communications with other

lawyers. In that vein, the Court addressed Musslewhite's First Amendment claim squarely within the guidelines of Bates v. State Bar of Arizona, 433 U.S. 550 (1977) and other Supreme Court cases on advertising. Musslewhite's contention that this case involves one of first impression with the application of State Bar disciplinary rules on advertising to communications "between attorneys" is simply untrue. Musslewhite is attempting to retry the disciplinary suit in this Court by having this Court reexamine the evidence introduced at trial.

Furthermore, Musslewhite has not complied with Supreme Court Rule 21(h) of the Rules of the Supreme Court which provides as follows:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific

> portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Musslewhite also attempts to invoke this Court's jurisdiction by claiming that his right to procedural due process of law was violated in connection with the Hartman matter.

Petitioner submits that Musslewhite has totally failed to comply with Rule 21(h) in his petition for writ of certiorari on this issue. Furthermore, the complaint he raised at the state court level was that the term of the disciplinary judgment he was found to have violated (taking on of new clients) was unconstitutionally vague. The Court of Appeals correctly found that the vagueness doctrine did not apply to a judgment on a

disciplinary action to which Musslewhite agreed (but rather to a "regulation").

For the reasons stated above, Musslewhite's Petition for Writ of Certiorari should be denied for want of jurisdiction.

All references in this brief will be to matters contained in the record submitted to the Court of Appeals and Supreme Court of Texas and shall be labeled as (T.) (pleadings and exhibits filed), and (S.F.)(testimony at trial). As of this date, this record has not been filed with this Court.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

On November 10, 1987, Honorable Solomon Casseb, Jr. ("Judge Casseb") called the disciplinary actions against Musslewhite to trial. The underlying disciplinary actions accused Musslewhite of three serious client neglects, attempting to pay off a complaining witness, communicating with a party represented by counsel, solicitation through the use of runners, and impoprer selling off of fee interests. Petitioners in those actions, the Grievance Committees for the State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee chairman, and Musslewhite appeared in person and by counsel. Counsel for Petitioners announced ready for trial and counsel for Musslewhite announced not ready for trial. After Judge Casseb overruled Musslewhite's motion for continunace

along with various other dilatory motions, Musslewhite sought to enter into settlement negotiations. Judge Casseb permitted the parties to discuss prospective settlement and the parties thereafter announced to Judge Casseb in open court a settlement of the disciplinary actions.

On January 29, 1988, Judge Casseb signed a Judgment in conformity with the agreement of the parties. The Judgment provides in pertinent part:

> IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days beginning on November 1, 1988, and ending on January 30, 1989.
>
> IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.
>
> IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respnodent shall be placed on probation for a period of three (3) years commencing on February 1, 1988, and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional miscondcut as defined by the State Bar Rules art. X, §7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton to a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

On July 19, 1988, the court-appointed custodian over Musslewhite's law practice, Hartley Hampton, and the State Bar of Texas, by and through its Office of General Counsel, filed a Motion to Conduct Oral Hearing with respect to Musslewhite's activities concerning the Piper Alpha tragedy in Scotland and concerning the filing of the Hartman lawsuit. Judge Casseb thereafter set such motion for hearing for September 18, 1988. Judge Casseb also ordered that the movants be permitted to engage in discovery. After discovery, the State Bar of Texas filed its Motion to Revoke Probation on September 12, 1988. Such motion raised the same issues as in the prior motion.

On September 20, 1988, Judge Casseb commenced receiving evidence on the Motion to Conduct Oral Hearing and then on the Motion to Revoke Probation. At the conclusion of proceedings on that day, Judge Casseb continued the matter over to October 17, 1988. On October 17 and 18, 1988, Judge Casseb received all the evidence Musslewhite or his counsel had to offer concerning the Motion to Revoke Probation.

By letter dated October 19, 1988, Judge Casseb granted the Motion to Revoke Probation, permitted Musslewhite to participate in a certain trial, and suspended Musslewhite from the practice of law for three (3) years, beginning December 1, 1988. On November 7, 1988, Judge Casseb heard Musslewhite's motions to conduct hearing on punishment, to reconsider, for rehearing and reconsideration, and to delay imposition of suspension. Judge Casseb overruled Musslewhite's motions, and

suspended Musslewhite from the practice of law for three (3) years, beginning January 31, 1989, so that Musslewhite could participate in a certain trial.

On November 21, 1988, Judge Casseb signed an Order Revoking Probation and imposing suspension for three (3) years, commencing January 31, 1989. Judge Casseb signed Findings of Fact and Conclusions of Law on December 27, 1988, and December 29, 1988.

REASONS FOR DENYING THE WRIT

I.

THE TEXAS COURTS DID NOT ERR IN UPHOLDING THE REVOCATION OF MUSSLEWHITE'S PROBATION BASED ON HIS CONDUCT CONCERNING THE PIPER ALPHA TRAGEDY.

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977) the Court held that truthful advertising related to lawful activities is entitled to First Amendment protection, but emphasized that false, deceptive, or misleading advertising remained subject to restraint and held that misleading advertising could be prohibited entirely.

False and deceptive advertising has a great potential for harm and thus a lawyer's right to advertise must be balanced against the Bar's responsibility to protect the public from fraud and deception. The United States Supreme Court has recognized that advertising for professional services poses special risks for deception because the public lacks the

sophistication concerning legal statements and misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973). Thus, the States and the Federal Government are free to prevent the dissemenation of commercial speech that is false, deceptive, or misleading. Friedman v. Rogers, 440 U.S. 1 (1979).

The Texas Code of Professional Responsibility provides for the minimum standard for attorney conduct with regard to advertising in Canon 2. The applicable Disciplinary Rule which the trial court found Musslewhite to have violated is DR 2-101 (Pet. G; 54a). It provides in part:

DR 2-101. Publicity and Advertising.

(A) A lawyer shall not make on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is

false or misleading if it:

(1) Contains a material misrepresentation of fact of law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Contains a statement of opinion as to the quality of legal services;

(3) Contains a representation of implication regarding the quality of legal services which is not susceptible to reasonable verification by the public;

(4) Contains predictions of future success;

(5) Contains statistical data which is not susceptible to reasonable verification by the public;

(6) Contains other information based on past performance which is not susceptible to reasonable verification by the public;

(7) Contains a testimonial about or endorsement of a lawyer;

(8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.

(B) A lawyer who publishes, advertises, or broadcasts with regard to any area of the law in which he practices must, with respect to each area of the law so advertised, publish or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(C) Each lawyer whose name is either published, advertised, or broadcast pursuant to DR 2-101(B):

(1) Who has been awarded a Certificate of Special Competence by the Texas Board

of Legal Specialization in the area so advertised must state with respect to each area, "Board Certified, (area of specialization)-Texas Board of Legal Specialization."

(2) Who has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advrrtised must state with respect to each area, "Not certified by the Texas Board of Specialization." Where the area so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

The rule itself speaks to communications about the lawyer or his services and specifically prohibits communications which are false or misleading. The rule goes on to state those factors which can render a communication false or misleading.

The communications made by Musslewhite which led to revocation of his license to

practice law were (1) the news release; (2) statements made at the press conference; (3) an advertisement in a local Aberdeen paper; and (4) an en masse direct mail solicitation campaign sent to the victims and families of victims of the Piper Alpha tradegy.

News Release (Pet. Ap. K; 75a)

The news release which was distributed at the news conference on July 15, 1988, violates DR 2-101 in that it contains false and misleading communications.

The self-laudatory language of a "team of internationally renowned U.S. lawyers based in Houston, Texas" is misleading because it fails to identify any of the lawyers. O'Quinn had not authorized Newman and Musslewhite to speak on his behalf. He merely agreed to accept any case Musslewhite could obtain for him. (S.F. 17, 187, 190). Newman himself admitted that he had never handled any foreign cases. (S.F. 58). The image conjured up by this statement

is one of an assemblage of lawyers proficient in the area of mass disasters standing by ready and willing to represent victims or families of victims involved in the tragedy. In truth, no team really existed. Musslewhite could not accept new cases, Newman had no experience in foreign litigation, and O'Quinn had merely agreed to accept referrals. In fact, Musslewhite admitted that anyone reading the news release would not know who the "team" was. (S.F. 31).

The news release also states that the team "would be working with United Kingdom solicitors to represent the victims or families of victims involved in the Piper Alpha tragedy." This statement is both false and misleading because it suggests that Musslewhite or the team already had Piper Alpha clients, when in fact neither Musslewhite nor the alleged team ever had any Piper Alpha clients. (S.F. 32).

The news release refers to Musslewhite as the "team's lead counsel." This is false and misleading because the release does not disclose that the Judgment of January 28, 1988 prevented Musslewhite from accepting new emloyment by clients and that he would be suspended for ninety days in the future. In addition, the intentions of Musslewhite, O'Quinn and Newman were that O'Quinn would be lead cousel, if not sole counsel. (S.F. 192). The release also suggests that Musslewhite was seeking clients for himself to handle when the true purpose was to secure clients for O'Quinn. (S.F. 187).

Similarly, the quote that the "team of attorneys I am leading are some of the best in the world in handling mass disaster litigation" is false and misleading because it never identifies the lawyers, it never discloses that the judgment of January 29, 1988, prevented Musslewhite from accepting new

employment by clients and that he would be suspended for ninety days, the quote is a statement of opinion as the quality of legal services, and the statement is not susceptible to reasonable verification, all in violation of DR 2-101(A)(1) and 1-102(A)(4). Reasonable verification regarding the quality of legal services means verification from sources other than the lawyer making the representation of implication.

Lastly, DR 2-101(C)(2) requires a lawyer who publishes, advertises, or broadcasts with regard to any area of law to include a disclaimer. The press release fails to include a disclaimer and thus violates DR 2-101(C)(2).

At the press conference itself, Musslewhite did not disclose the terms of the Judgment and estimated a range of recovery for wrongful death cases between $1 million and $5 million in Texas State courts. (S.F. 39).

Such predictions of future success are prohibited by the rule and his comments clearly create an unjustified expectation about results that Musslewhite could achieve.

Advertisement (Pet. Ap. L; 77a)

The advertisement which was published in the local Aberdeen paper contains similar misrepresentations in violation of DR 2-101.

Again, the reference to a "team of internationally renowned American lawyers experienced in handling damage claims in mass disaster in the United Sttes of America and Europe" is false and misleading because it never identifies the laweyrs and is not susceptible to reasonable verification by the public.

In addition, the advertisement refers to the "team now in Aberdeen." Musslewhite had alredy left Aberdeen by the time the ad had run. Newman is not an internationally renowned American lawyer experienced in

handling damage claims in mass disasters in the United States of America and Europe and O'Quinn never even went to Scotland.

Furthermore, as with the news release, this advertisement constitutes a publication, advertisement, and broadcast with regard to an area of law in which Musslewhite and Newman practice and the failure to include the disclaimer clearly violates DR 2-101(C)(2).

Letter Mailed to Victims (Pet. Ap. M; 81a)

The July 18, 1988, letter Newman wrote to the victims in concert with Musslewhite is false and misleading.

Once again, the reference to a "group of internationally renowned trial lawyers in the United States" is false and misleading because it never identifies the lawyers and because the statement is not susceptible to reasonable verification by the public.

Furthermore, the statement that the team is "currently having discussions with a number of United Kingdom solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false and misleading because it suggests that the "team" already had Piper Alpha clients when in fact it had none and is false and misleading because it constitutes a prediction of future success.

Thus, the evidence established at trial clearly supports the trial court's decision of a finding of professional misconduct.

II.

Musslewhite's two main contentions as to why his conduct does not violate the rules are (1) the communications were "ultimately" directed to solicitors and (2) Newman acted alone with respect to the advertisement and en masse letter to the victims and families.

Musslewhite's first argument appears to be that since the communications state that the "team's" policy is to work through Scottish or United Kingdom based solicitors that this somehow transforms the solicitations from ones directed to the public into ones really for solicitors. This argument is tenuous at best. Why hold a news conference and issue a press release to reporters if the objective is to merely contact solicitors? It would have been simpler merely to contact these solicitors directly. In fact, the evidence at the hearing indicates that Musslewhite and Newman had already contacted solicitors by telephone and through the mail. (S.F. 60; Pet. Ex. 11 #4, 7). The news conference is the most efficient way to attract the public at large and there can be no other reason why Musslewhite and Newman contacted a public relations consultant except to help them procure cases and to direct their

pleas to the victims and their families. The advertisement is cleary directed towards the victims and families as well as Scottish solicitors who may already have cases and it invites individuals to call Newman directly if they have no solicitors. And it is undisputed that the letters are clearly addressed to victims and their families. (Pet. Ex. 11 ¶13).

Musslewhite's entire publicity scheme was misleading. He knew he could not accept new employment but wanted to be able to receive what he expected to be a considerable amount of referral fees when he procured the cases for O'Quinn. Thus, he engaged in an undertaking whose sole aim was to entice potential victims or their families into believing that scores of Texas lawyers were on hand and would be able to recover up to $5 million for each and everyone. Musslewhite attempts to argue that his failure to mention

his disciplinary suspension was not a material omission of fact because it was not relevant at the time the communication was made, that it was premature, and only became material when a client was procured. But in truth, no mention of it was made because who would contact a lawyer already serving a probated term of suspension. Musslewhite needed to bait these individuals into contacting them and planned on switching his approach once the client had been hooked. He claims he fully disclosed the terms of the disciplinary judgment to all solicitors he spoke to but again in truth he only revealed the information after the adverse publicity surfaced in the Scottish press.

Musslewhite attempts to divorce himself from Newman and asserts that Newman acted alone when in Scotland and specifically with regard to the running of the advertisement and letter mailed to the victims. But the record

is clear that from the onset of their endeavor they operated jointly and in concert to attain their goal of obtaining Piper Alpha clients.

In support of the Musslewhite/Newman connection, the evidence indicated that Musslewhite called Newman and requested he work with him on the project and instructed Newman with respect to applicable law before sending Newman to Scotland. (S.F. 58, 19). Newman went to Scotland at Musslewhite's invitation and it was Musslewhite who provided Newman with a list of solicitors and potential clients to telephone once he arrived. (S.F. 20). Musslewhite needed Newman in Scotland since he could only stay in Aberdeen for a couple of days and Newman reported to Musslewhite his activities during Newman's stay in Scotland. (S.F. 22). When Musslewhite arrived in Scotland, he and Newman went over what had occurred and Newman himself refers to "the plan." (S.F. 65, 76).

Musslewhite says he and Newman made the decision together to send the mass mailout to the solicitors. (S.F. 23). Newman testified that Musslewhite had already written a letter, and wanted to do the mass mailout and the advertisement, and that in fact it was Musslewhite's idea. (S.F. 63, 64). Newman reviewed both the advertisement and letter to victims with Musslewhite before the ad ran in the paper or the letters were mailed. Newman read Musslewhite the language over the telephone. (S.F. 49, 50) (S.F. 50, 70-71) (S.F. 285, 286). Both were done on behalf of the "team." Musslewhite knew of the ad, knew it was going to be run and permitted the running of the advertisement. (S.F. 50, 63, 64). Musswlewhite testified that he did not tell Newman not to run the ad and that it was not a surprise to him that the letter had been sent. (S.F. 50-51). Thus, the evidence clearly establishes that both the running of

the advertisement and the sending of the letter was in continuance of the "plan" to secure Piper Alpha cases that Musslewhite and Newman operated together.

II.

THE TEXAS COURTS DID NOT ERR IN UPHOLDING THE REVOCATION OF MUSSLEWHITE'S PROBATION WITH RESPECT TO THE HARTMAN MATTER.

Musslewhite contends he was not afforded procedural due process at the hearing. Musslewhite misstates the record. On July 19, 1988, the State Bar and Custodian filed their Motion to Conduct Oral Hearing. This motion requested a hearing concerning Musslewhite activities in Scotland and the circumstances surrounding the Hartman case. On July 22, 1988, the State Bar and Custodian filed a Motion to Permit Discovery which states that a hearing was already scheduled for September 19, 1988, and requested permission to engage in discovery in preparation for the evidentiary hearing. Based on the discovery,

the State Bar filed its Motion to Revoke on September 12, 1988.

The evidentiary hearing was held on September 19, 1988, at which time Musslewhite specifically stated he had no objection to going foward. (S.F. 10). On September 20, 1988, the Court allowed the State Bar to put on its case on the Motion to Revoke and thereafter continued the cause to October 17, 1988, to afford Musslewhite the opportnity to complete discovery. Again Musslewhite specifically indicated he had no objection to the procedure. (S.F. 7). Thus, any objection he may have had was waived.

The Agreed Judgment of January 29, 1988, specifically prohibited Musslewhite from accepting new employment by clients until November 1, 1988. Musslewhite's arguments regarding referral fees is misplaced. The issue is not whether he could receive referral fees, but whether his conduct concerning the

Hartmans constitutes the acceptance of new employment. Clearly it does.

The Court of Appeals discussion concerning the Hartman matter is accurate.

The evidence shows that Ronald Lee Hartman and his wife, Katherine H. Hartman, employed Musslewhite in April of 1988 to pursue claims resulting from Mr. Hartman's possible exposure to Agent Orange. Mrs. Hartman executed a Power of Attorney on behalf of Mr. Hartman and herself employing the Law Offices of Benton Musslewhite, Inc. for such purposes. (Pet. Ex. 1; Pet. Ex. 11 #18). Musslewhite admitted to accepting this new employment from the Hartmans as clients and in fact testified that the case had been referred to him from Gwynne Old, a Houston lawyer. (S.F. 54; Cust Ex. 8 p. 154).

Musslewhite then prepared and filed the lawsuit on behalf of the Hartmans on June 22, 1988. (Pet. Ex. 5). This petition was signed

by Musslewhite and designates him as lead counsel under Tex. R. Civ. Pro. 8. Specifically, Rule 8 provides in part that on the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge. The filing of the lawsuit obligated Musslewhite with certain duties and responsibilities to the Hartmans and Musslewhite admitted that by filing the lawsuit he was undertaking a responsibility in the case. (S.F. 295).

Musslewhite argued that the Hartmans were not new clients since he had been constructively representing them since 1979 with the filing of the first Agent Orange lawsuit. Whether the Hartmans were already "constructive" clients, which the State Bar disagrees, is irrelevant. The point is that Musslewhite accepted new employment. Musslewhite admits the lawsuit filed on behalf

of the Hartmans is separate and distinct from the Sharkey litigation. (S.F. 291).

Musslewhite testified that the Hartmans were unknown to him before this. There was no personal service or personal relationship between the Hartmans and Musslewhite, but only a general professional obligation that he will represent them along with the other members of the class to the best of his ability. However, in April of 1988, the circumstances changed.

At that point in time, Mrs. Hartman conferred with Musslewhite about the possibility of representing them and they entered into a contract for emplyment with Musslewhite. There is now a contract between himself and the Hartmans and he removed them from the class and filed an action on their behalf in Jefferson County.

This clearly is new employment which had not been contemplated and would not have been

taken but for the fact that they entered into the power of attorney in April of 1988.

Musslewhite's actions are consistent with a lawyer who has taken on a new case. He attempts to argue that he "referred" the case to Wayne Mansulla and merely "signed them up" in order to receive his referral fee. However, the evidence shows that at most Musslewhite merely associated Mr. Mansulla in the lawsuit. Musslewhite's obligations to the Hartmans never ceased to exist. Musslewhite sent a letter to Mr. Mansulla on June 28, 1988, which was the first writing to or with Mr. Mansulla indicating that Musslewshite wanted Mansulla to work with him on the Hartman lawsuit. (Def. Ex. 8). This letter itself merely refers to Mansulla as the "case manager" and thus indicated that Musslewhite would continue to have responsibility in the case.

In fact, the Hartmans did not execute the second Power of Attorney with Mr. Mansulla until August 2, 1988, and this did not occur until after the Custodian and the State Bar filed their Motion to Conduct Hearing on July 19, 1988. The Mansulla firm subsequently withdrew from the case and Musslewhite remained lead counsel in the Hartman case at the time the trial court's judgment was signed.

But Musslewhite filed the lawsuit prior to associating Mr. Mansulla. At the point of the filing, Musslewhite was the attorney to whom the Court would look to be responsible for the prosecution of the case. He was the one who had professional responsibility for seeing this through the judicial process. The other lawyers whose names he signed by permission were not even members of the Bar of the State of Texas.

It is important to note that the purpose of prohibiting the acceptance of new cases was directly tied to the neglect allegations originally brought against Musslewhite in the underlying disciplinary suit. The consensus was that if a Custodian was appointed to oversee Musslewhite's practice in addition Musslewhite would agree not to take on any new cases then perhaps Musslewhite could concentrate on serving the needs of his current clients with current matters. (S.F. 225, 225). This agreement was made in order to protect both Musslewhite from future allegations of misconduct and to protect future clients from facing a situation in which their cases were being neglected.

Musslewhite spends a considerable amount of time focusing on the "referral clause." He continues to argue that he only signed up the Hartmans so that he could get his referral fee which the agreed judgment allowed him to do.

He argues that a power of attorney and an attorney-client relationship is required before a referral can be made from the referring lawyer to the referral attorney and cites Disciplinary Rule 2-107 (Pet. Ap. G; 55a). DR 2-107 is entitled "Division of Fees Among Lawyers." It provides in part:

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office unless
>
> (1) The division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer. (Emphasis added).

There is no requirement that an attorney-client relationship be established before a division of fees is made. It simply is not contemplated by the rule.

Again Musslewhite attempts to shift the focus of this case to an issue that is not relevant to the revocation proceeding. Whether he received a referral fee is not the issue but rather did he accept new employment.

Therefore, whether he followed custom and practice is not relevant.

Thus, the evidence clearly establishes the acceptance of new employment in violation of the agreed judgment and the terms of probation.

Musslewhite also contends that the restriction on employment is an unauthorized sanction.

Once again, the judgment entered by the trial court was in conformity with the agreement of the parties. This case involves an agreed judgment whereby Musslewhite and the State Bar negotiated the sanction of a ninety (90) day actual suspension followed by a three (3) year probated suspension.

Thus, the negotiated discipline is the actual suspension followed by the probated suspension. Suspension both actual and probated is clearly provided in the State Bar Rules. What Musslewhite is really complaining

about are the terms of probation. All probated sanctions possess specific terms to which an attorney must comply or else face the possibility of revocation of his license. Terms of probation in disciplinary cases can include anything from requirememts of additional minimum continuing education hours, specified hours of community service, regular audits of trust accounts, etc. Musslewhite agreed to the terms in his probation, one of which was the prohibition of new employment. There is no evidence that the agreement was made under fraud or duress. The judgment was the result of the settlement between the parties on the underlying disciplinary lawsuit. Naturally, it places "restrictions" on his license to practice law. It's a sanction - that's its purpose.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that

Petitioner's Application for Certiorari is denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent In Opposition to Petition for Writ of Certiorari has been served on William J. Murphy, attorney of record for Benton Musslewhite, Seventh Floor, 100 Light St., Baltimore, Maryland 21202, by delivery of a true copy to him by certified mail, return receipt requested, by depositing same in a properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 5th day of June, 1991.

Linda A. Acevedo

Supreme Court, U.S.
FILED
JUN 17 1991
OFFICE OF THE CLERK

(4)

No. 90-1708

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BENTON MUSSLEWHITE,
Petitioner,

v.

THE STATE BAR OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of the State of Texas

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

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1. In the opening section of its Opposition, respondent "objects" to this Court's jurisdiction over this case, suggesting that the Petition does not meet the criteria of Supreme Court Rule 10.1(b) and (c). Opp. at 1-2.[1] Petitioner has urged plenary review of this case because the opinion of the Texas Court of Appeals is in conflict with decisions of the United States Court of Appeals for the Third Circuit and the Michigan Supreme Court, as well as numerous decisions of this Court. In arguing that

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[1] Respondent actually cites former Supreme Court Rule 17, which was revised and recodified as Rule 10, effective January 1, 1990.

there is no conflict, respondent has not even referred to the Court of Appeals' decision in *Spencer* v. *Honorable Justices of Supreme Court of Pennsylvania*, 760 F.2d 261 (3d Cir. 1985), *aff'g*, 579 F. Supp. 880 (E.D. Pa. 1984), nor to the Michigan Supreme Court's decision in *Matter of Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979). Under both those decisions, petitioner's communications in Scotland, seeking to establish a dialogue with Scottish solicitors about the possible referral of Piper Alpha cases, could not have been subjected to bar discipline. *See* Pet. at 22-23 & n.20. As for this Court's prior decisions, respondent makes passing reference only to *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), ignoring all subsequent developments in this important area of First Amendment jurisprudence. The Texas Court of Appeals in this case decided some of the constitutional issues raised by petitioner, and deferred other issues to the Texas Supreme Court and to this Court. *See* App. A, at 6a-7a. Yet respondent inexplicably pretends that these issues are not presented by this case.

2. Respondent contends that petitioner has not complied with this Court's former Rule 21(h), now set forth in Rule 14.1(h). *See* Opp. at 3-4. Yet the Petition describes in ample detail how the District Court and Court of Appeals resolved the constitutional questions presented herein. *See* Pet. at 14-20. Although respondent does not explicitly contend that the federal issues were not raised and decided in the court of first instance and in the appellate court, petitioner is reluctant to let respondent's invocation of Rule 14.1(h) stand unchallenged.

Petitioner raised the First Amendment issues posed by the disciplinary proceedings in his "Original Answer and Opposition to Motion to Revoke Probation," which was filed in the District Court on September 20, 1988. In Part V, B of that Answer petitioner argued that he could not be disciplined based on the statements he made concerning the Piper Alpha tragedy because those commu-

nications all were directed toward establishing contact with Scottish solicitors rather than the victims themselves, and because his statements were not false or misleading. Petitioner expressly asserted that any contrary reading of the Texas Disciplinary Rules would violate his First Amendment rights. The District Court rejected these contentions *See* App. D, at 44a-49a. Petitioner reiterated these arguments in the Points of Error numbered One through Eleven in his brief filed in the Court of Appeals. Each of these points of error was overruled. *See* App. A, at 5a-9a.

Petitioner also raised the due process issues posed by respondent's effort to sanction him for his acceptance and referral of the *Hartman* matter in his Original Answer, at Part V, A, and in a Supplemental Answer filed in the District Court on October 17, 1988. The District Court rejected these constitutional arguments, as well. *See* App. D at 43a-44a, 49a. The issues were presented to the Court of Appeals in Points of Error Twelve through Twenty of petitioner's Brief, and were rejected by that Court as well. *See* App. A, at 10a-13a.

Respondent's veiled suggestion that the issues presented in this Petition were not properly preserved in the courts below is not borne out by the record, which demonstrates that petitioner challenged the constitutionality of the State Bar's actions against him on federal free speech and due process grounds at every stage of the proceedings below. The respondent's invocation of Rule 14.1(h) is frivolous.

3. In its Statement of the Case, Opp. at 6, respondent attempts further to sully petitioner's reputation by repeating the unfounded and unproven allegations of the 1987 disciplinary proceedings it instituted against the petitioner. Those proceedings form the backdrop to this Petition, but the scurrilous allegations advanced by re-

spondent in 1987 have nothing to do with the issues raised herein.[2]

4. Respondent's principal argument presented in its Reasons for Denying the Writ, respecting petitioner's First Amendment claims, is that there is nothing for this Court to review because the Texas courts found petitioner's Piper Alpha statements to be false and misleading. Opp. at 12-22. Respondent, like the Court of Appeals, does not address the sophistication of petitioner's intended audience of Scottish solicitors, nor the holding of this Court in *Bates* that "the determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." 433 U.S. at 383, n.37. *See* Pet. at 22.

Respondent likewise does not address the decisions of the Court of Appeals for the Third Circuit in *Spencer*, and the Michigan Supreme Court in *Jaques*, which applied *Bates*' analysis and prohibited bar discipline from being imposed against attorneys based on allegedly misleading communications made to other attorneys and to a sophisticated union business agent. *See* Pet. at 22-23.

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[2] Respondent also asserts in its Statement of the Case, Opp. at 9, that the Motion to Revoke Probation that it filed on September 12, 1988 raised the same issues as the Motion to Conduct Oral Hearing filed on July 19, 1988. Although this factual assertion is not directly pertinent to the questions presented in the Petition, it is false. In the Motion to Conduct Oral Hearing, respondent and petitioner's custodian, Hartley Hampton, suggested that petitioner had "solicited" survivors of the Piper Alpha disaster. App. J., at 71a-72a. In the later Motion to Revoke Probation, respondent abandoned the allegations of improper solicitation, and alleged for the first time that the news release, newspaper advertisement, and letter to victims and their families were "false and misleading." *See* App. I, at 67a-69a. The Court of Appeals accepted respondent's specious argument that petitioner was placed on notice of the principal charges against him by the Motion to Conduct Oral Hearing. *See* App. A, at 13a. This Court should not be misled so readily by respondent's propensity to misstate the record.

Respondent does not address the failure of the Texas courts in this case to analyze the alleged misleading nature of petitioner's Piper Alpha statements based on "an independent examination of the whole record" as required by this Court's decisions in *Peel* v. *Attorney Registration & Disciplinary Comm'n*, —— U.S. ——, ——, 110 S.Ct. 2281, 2291-92 (1990), and *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 463 (1978). *See* Pet. at 23-24.

Instead, respondent itself has ignored and distorted the record, and mouthed the same conclusionary reasoning offered by the Texas Court of Appeals to explain why petitioner's statements were false and misleading. *See* Opp. at 16-22.[3] Respondent goes so far as to include in its litany of petitioner's alleged misleading statements, comments that he made during an interview with the media in Aberdeen, Opp. at 16, 19-20, despite the fact

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[3] The body of the Brief of Respondent In Opposition to Petition for Writ of Certiorari, filed in this Court, is drawn *word-for-word* from the body of the Reply to Application for Writ of Error, which respondent filed in the Supreme Court of Texas on May 7, 1990. Respondent's lack of initiative in formulating its Opposition in this Court explains why the State Bar has devoted so many pages to issues, including issues of state law, that petitioner has not raised in this Court, and has failed to address the precise due process question that petitioner has presented to this Court. *See, e.g.*, Opp. at 25-28 (addressing the question whether petitioner should have been held accountable for the actions of Kelly Newman); Opp. at 28-29 (discussing the timing of the District Court's evidentiary hearing); Opp. at 29-36 (discussing whether or not the Hartmans were "new" clients); Opp. at 37-38 (discussing whether a three year suspension is a sanction authorized by Texas law). Petitioner presented these issues to the Texas Supreme Court; he did not raise them as questions presented in his Petition to this Court.

The fact that the State Bar of Texas did not even take the time and effort required to prepare an Opposition in this Court that addresses the federal constitutional questions presented by petitioner's suspension from the bar, lends further credence to petitioner's contention that neither the State Bar nor the Texas courts ever devoted adequate attention to this Court's decisions, or to the constitutional rights of petitioner that were infringed by the disciplinary proceedings and by the harsh sanctions imposed against him.

that those comments were *not* included within the charges filed by the State Bar as grounds for revoking petitioner's probation. *See* App. I, at 67a-69a.[4]

5. In support of its argument that petitioner's Piper Alpha statements were false and misleading, respondent ascribes intentions to petitioner and to John O'Quinn that are flatly contradicted by the record, or totally devoid of evidentiary support. For example, respondent asserts that "O'Quinn had not authorized . . . Musslewhite to speak on his behalf" to the Scottish solicitors. *See* Opp. at 16. This assertion is not consistent with O'Quinn's testimony that he *had* authorized petitioner to "tell the solicitors that if they wanted to have cases filed in Texas . . . that I was interested in working with them . . . or in taking such cases on a referral." *See* Pet. at 8, quoting Tr. of Oct. 17, 1988, at 190. Respondent's repeated assertion that petitioner was attempting to secure clients for O'Quinn, and was engaged in a sort of "bait and switch" tactic with the solicitors, *see* Opp. at 24-25, is a figment of respondent's active imagination, unsupported by record citation or by any record evidence.

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[4] Respondent contends that during the "press conference" in Aberdeen, petitioner "estimated a range of recovery for wrongful death cases between $1 million and $5 million in Texas State courts," and that such "predictions of future success . . . clearly create an unjustified expectation about results that Musslewhite could achieve." Opp. at 19-20. The record discloses that petitioner made that estimate of a range of recovery in response to a question from a Scottish television news reporter. In the same response, however, petitioner told the reporter: "Again I want to emphasi[ze], no lawyer can guarantee recovery of any amount to any client and I wouldn't want any client to have false hopes, but I'm just trying to give you some estimate of what the ranges are." DX 3; Tr. of Oct. 17, 1988, at 250-55. It could fairly be argued that for the State Bar to rely on petitioner's statements during this interview, and to contend in this Court that they contained a misleading prediction of future recoveries, without including petitioner's express disclaimer quoted above, is misleading. In fact, respondent has made a communication to this Court that "omits a material fact necessary to make the statement considered as a whole not materially misleading." Texas DR 2-101(A)(1).

Respondent further asserts that "in truth" petitioner did not reveal the terms of the Agreed Judgment to any of the Scottish solicitors until after publicity about petitioner's probation had "surfaced" in the Scottish press. *See* Opp. at 25. "In truth," however, the only evidence concerning the nature of petitioner's disclosures to the solicitors was the testimony offered at trial by petitioner himself. Petitioner testified, and his testimony was uncontradicted, that he disclosed the terms of the Agreed Judgment to several solicitors *before* it was reported in the press. *See* Pet. at 11; Tr. of Sept. 20, 1988, at 34, 42-43; Tr. of Oct. 17, 1988, at 271-73.

It is more than a bit ironic that the State Bar of Texas would attempt to mislead this Court about the record in a case concerning the factual basis for the State Bar's assertion that petitioner had published false and misleading communications in violation of the Bar's Disciplinary Rules. It bears repeating that essentially the *only evidence* presented by respondent to support its charge that petitioner attempted to mislead anyone is contained in the text of the three Piper Alpha communications that were used in an effort to establish a dialogue between petitioner's team of Texas attorneys and the solicitors for the Piper Alpha victims. That this was the purpose of the three communications is plain from the face of those documents; that they did not contain "false and misleading" statements is equally plain. The essential facts from which this Court may decide the important First Amendment issues presented by this case all are comprised within the three communications set forth in six pages of the Appendix, at 75a-80a. This Court should not permit respondent to succeed in its transparent effort to distort the record, and thereby divert this Court's attention from those issues.

6. Respondent's arguments with respect to the due process violations inherent in its treatment of the *Hartman* matter are difficult to answer, because respondent

simply has not addressed the central points raised in the Petition. It is undisputed that Hartley Hampton, the custodian appointed by the District Court to monitor petitioner's compliance with the Agreed Judgment, told petitioner that he had "no problem" with petitioner's handling of the Hartmans' case, and his referral of those clients to Mr. Mansulla. *See* Pet. at 12, 29-30. In spite of that fact, the State Bar acted to revoke petitioner's probation based in part on the actions approved by Mr. Hampton. The District Court, which appointed Mr. Hampton and which later concluded that "[a]ll actions of Hartley Hampton have been proper and authorized by order of this Court," App. D, at 49a, nonetheless suspended petitioner from the bar for following Mr. Hampton's advice.

In addressing itself to the due process question, respondent never mentions Mr. Hampton's advice. Most of the due process "analysis" contained in the Opposition consists of an effort to refute arguments that petitioner did not include in the questions presented to this Court. *See* note 3 *supra*.

7. Not content with simply side-stepping the issues, respondent also misstates the record concerning the *Hartman* matter. The State Bar's contention that "Musslewhite filed the [*Hartman*] lawsuit prior to associating Mr. Mansulla," Opp. at 34, is blatantly false. The record facts concerning petitioner's dealings with the Hartmans and his referral of their case to Mr. Mansulla are accurately summarized, with appropriate record citations, in the Petition, at pages 11 to 13. The District Court ignored this uncontradicted evidence, as did the Court of Appeals. *See* Pet. at 12, n.9. Respondent apparently feels no compunction about attempting to mislead this Court, as well, into accepting as "truth" its distortions of the record.

CONCLUSION

Respondent has shown its disregard for this Court by filing an Opposition that is drawn, *in haec verba*, from papers it filed in the Supreme Court of Texas, and that obviously fails to address the questions presented in the Petition. Respondent has shown its continuing disregard for petitioner, a member of its bar, by misstating the record facts in a blatant attempt to divert this Court's attention from the important constitutional issues petitioner seeks to present for review. Despite the misleading contentions of respondent to the contrary, these federal constitutional issues were raised and preserved in the Texas courts, and they fully warrant this Court's plenary review. The Petition for a Writ of Certiorari should be granted.

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